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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 746

FORD M. CONVERSE, Petitioner,

v.

STEWART L. UDALL, Secretary of the Interior

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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NOTE: References in the text to "R" followed by a number refer to the record of the United States Court of Appeals.

References to "Tr." and number refer to the transcript of testimony in the Department's Exhibit 1 in support of its motion for summary judgment.

In the same exhibit, requested findings of fact are found in Mr. Converse's Brief to the Hearing Examiner, whose rulings on the requested findings are in his opinion, A 86, 87.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ford M. Converse, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Court below affirmed the decision of the United States District Court for the district of Oregon. The District Court affirmed the decision of the Secretary of the Interior on judicial review of his administrative action.

OPINIONS BELOW

The 1968 opinion of the Court of Appeals for the Ninth Circuit (Appendix A, infra, pp. A1-A15) is reported, Ford M. Converse v. Stewart L. Udall, Secretary of the Interior, No. 21,697, August 19, 1968. 399 F.2d 616.

The 1966 opinion of the United States District Court for the District of Oregon (Appendix B, infra, pp. A16-A42)is reported at 262 F. Supp. 583.

The 1965 opinion for the United States Department of the Interior, Office of the Secretary (Appendix C, infra, pp. A42-A62) is reported in 72 I.D. 141.

The 1963 opinion of the United States Department of the Interior, Assistant Director, Bureau of Land Management (Appendix D, infra, A62-A71)is unpublished.1/

The 1963 opinion of the United States Department of the Interior, Office of the Hearing Examiners, Bureau of Land Management (Appendix E, infra, A71-A87) is unpublished.2/

1/ Unpublished copy may be obtained from United States Department of the Interior, Director, Bureau of Land Management, Office of the Solicitor, Oregon 011195-D, October 8, 1963.
2/ Unpublished copy may be obtained from United States Department of the Interior, Contest No. Oregon 011195-D, January 29, 1963.

The judgment of the United States Court of Appeals for the Ninth Circuit to be reviewed was dated and entered August 19, 1968. Rehearing was denied October 7, 1968. An order entered October 18, 1968, fixed November 16, 1968, as the time within which to file a petition for certiorari. Mandate was stayed until final dispostion of this case by the Supreme Court of the United States.

JURISDICTION

Title 28 U.S.C. 1254(1) as revised by the Act of June 25, 1948, Chapter 646 (62 Stat. 928) is believed to confer on the Supreme Court of the United States jurisdiction, in its discretion, to review this case by writ of certiorari.

QUESTIONS PRESENTED

1. Whether the Department of Agriculture has jurisdiction to initiate, and the Department of the Interior has jurisdiction to prosecute, under the Surface Resources Act, proceedings to take from Converse his surface rights to mining claims retroactively without compliance with the conditions of the statutes and the regulations upon which their jurisdiction is made to depend, i.e., where there was no complaint, where there was no certificate of title, and where there was no service of publication, as required by law.

2. Whether Converse was denied "Due Process" and a fair trial, by agency failure to give him notice of the issues by complaint before trial, by forcing him to trial by an examiner who has prejudged his case, and by prohibiting him from making offers of proof for the record.

3. Whether the ultimate agency finding that no mineral discovery had been made is conclusive, where the basic facts found establish a mineral discovery as a matter of law, a lode containing locatable minerals of higher average values than similar ores mined in the United States.

CONSTITUTION AND STATUTES

1. The Fifth Amendment to the Constitution of the United States providing due process, notice and hearing, and protecting property against taking without compensation is sufficiently familiar to the Court as not to require quotation.

We have set forth in the Appendix the pertinent portions of the following statutes:

1. The Surface Resources Act of July 23, 1955, 69 Stat. 368, 369, 30 U.S.C. Section 613 (1958 ed.) A88-A-90

2. The Administrative Procedure Act, 60 Stat. 239, 240, 5 U.S.C. Section 1004(c), Section 1005(b) and Section 1008(a) (1958 ed.) A-90-A91

3. The regulations governing proceedings in Government contests of mining claims, 43 CFR Sections 221.53, 221.54, 221.58 and 221.68 (as in effect January 1, 1962) A91-A92.

STATEMENT OF THE CASE

Converse located the Edith and Paymaster lode mining claims in 1951 for minerals of intrinsic value: gold, silver, lead, copper and zinc. The Surface Resources Act, 69 Stat. 368, 369, 30 U.S.C. Section 613, became effective in 1955. This is a proceeding brought by the Departments of Agriculture and the Interior to

bring these earlier located mining claims within the restrictions of Section 4 of the Surface Resources Act.

Converse challenged agency jurisdiction for failure to comply with statutory conditions upon which the agencies' jurisdiction was based. The Secretary reversed the Director and held that the Paymaster and Edith claims were not affected by the published notice of November 1, 1956, since the Forest Service, Department of Agriculture, had not complied with the statute authorizing it to initiate prosecution under the Surface Resources Act. A-27863, April 20, 1959.

Thereafter, Forestry initiated this proceeding. Converse again has challenged the jurisdiction of the agency to initiate, and of Interior to prosecute, these proceedings. Although the Court of Appeals, in adopting the District Court's opinion by reference, found three instances in which there had not been agency compliance with the statutory requirements governing its jurisdiction, the Court affirmed the summary judgment for the Secretary.

No complaint was filed. A33. No complaint was served on Converse. It was not until about the middle of the trial that the Examiner notified him of the issue being tried.

The Court of Appeals adopted by reference the finding of the District Court that "No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct." A32-A33. But the Court of Appeals did not reverse summary judgment for the Secretary.

Likewise, the Court of Appeals adopted the finding of the lower court that "A copy of the publication was not served on the mining claimant, as demanded by the statute." A33. But the Court of Appeals did not reverse the summary judgment.

Before trial, Converse moved for a change of hearing examiner, based on the Administrative Procedure Act. The Examiner admitted the facts alleged in support of the motion, but denied the motion. Tr. 4,5.

Converse made offers of proof. He made offers under the rule. He offered to state into the record what he proposed to prove. He was prohibited from doing so. Tr. 24, 25, 58-61, 143, 148 -150, 174.

While this case was pending before the Examiner and before it was decided, Forestry went on the claims with a bulldozer. It caused boulders and trees, one six feet across, to be hurtled down on miners working in the discovery pit below. They fled for their lives. Although it was dangerous, the miners cleaned out the pit two or three times. Each time the pit was cleaned out, it was filled by Forestry bulldozing debris into the pit. This was done by Forestry so the Mining Claimant could not exhibit for inspection the discovery pit to Mr. Suchy, Mineral Officer for Forestry. The mineral officer could not and did not sample the discovery pit. Finding No. 8, Tr. 197, 198, 204, 205, 210.

Bulldozer cuts made by Forestry exposed the lode in the Edith claim. Assays of samples of the lode in these cuts received in evidence, were excluded by the Examiner at the trial

as being discoveries made after 1955. He refused to make findings with respect to assays of samples taken by Forestry and Converse from the dozer cuts in the road made by Forestry. These exposures were in the southern half of the Edith claim.

However, the Examiner did make basic findings of fact as to the Edith claim with respect to samples taken from exposures discovered before 1955. He found that a lode had been discovered; that samples were taken from the lode ranging from $7.64 per ton to $170 per ton. He found, based on stipulation, that a sample of ore from an exposed outcrop, not exposed by road work, contained 7 to 10% lead and 10 to 15% zinc. He found that the land on which the Edith is located is mineral in Character. Findings 2, 3, 7 and 12.

He also found, with respect to the Paymaster claim, that a lode had been discovered, and that samples of the lode assayed from $29.57 per ton to $167.88 per ton. He found that about fifty years ago, Mr. Converse took Exhibit 34 from the Paymaster adit. It was stipulated that this sample contained 60% lead and 20% zinc. Findings 2, 3, 14 and 15.

Milvoy M. Suchy, Mining Engineer and Minerals Officer for the Government, testified that if the Converse claims were his, he would, as a prudent man, spend money on the claims. He would bulldoze and drift on the vein. It would be justifiable to spend more money on the property in an effort to determine the extent of the ore body. Tr. 101. He advised Mr. Converse to do so. Tr. 100.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The District Court of the United States had jurisdiction of this action under the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. Sec. 1009; the Act of June 25, 1948, Ch. 646, 62 Stat. 930, 28 U.S.C. Sec. 1331, as amended, with respect to actions arising out of the Constitution and laws of the United States; the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. Sec. 1361, 1391, which authorizes action to compel an officer of the United States to perform his official duty with respect to real property; and the inherent power of the Court to grant injunctive relief in the premises.

REASONS FOR GRANTING THE WRIT

This case is important to our mining industry, upon which our nation depends for strategic metals. Gold, silver, copper, lead and zinc, in short supply, are important to our national defense and to industry. For the lack of gold, we have been forced to go on a paper, or fiat, money standard.1/

1/Clifford L. James, Principles of Economics, Barnes & Noble, Inc., N.Y. 9th Ed. (1956), p. 126, "The paper standard is generally adopted involuntarily. Because of an emergency, such as a war, paper money is issued to pay extraordinary expenses. If the quantity is excessive (and this temptation is great), purchasing power falls and confidence in redeemability is lost. The paper money becomes fiat money or

Small mines, because of their number, are no less important than large mines to our natural economy.

The enforcement of statutory safeguards and limitations on bureaucratic jurisdiction and power are important to all citizens.

The Court of Appeals has decided important questions of law in a manner conflicting with pronouncements of this Court and with pronouncements of Courts of Appeals in other circuits. These questions of law should be settled by this Court.

FIRST: THE DEPARTMENT OF AGRICULTURE AND THE DEPARTMENT OF THE INTERIOR HAD NO JURISDICTION TO INITIATE OR PROSECUTE PROCEEDINGS UNDER THE SURFACE RESOURCES ACT WHEN THEY FAILED TO COMPLY WITH THE MANDATORY CONDITIONS UPON WHICH THEIR JURISDICTION IS MADE TO DEPEND.

A. Agency jurisdiction depends on strict compliance with the statute which authorizes the agency's action. An attempt to exercise power without compliance with the provisions of the Act as to the manner and circumstances of its exercise is a nullity. 5 U.S.C. Sec. 1008(a).

1/ (continued) printing press money. The paper standard is always expressed in terms of the specie standard which existed prior to the inflation, but the paper has displaced the specie as the medium of exchange and the standard of value. The United States during the Civil War (greenbacks) and many European nations during the World Wars were on a paper standard."

Statutory administrative agencies are governed strictly by the statutes from which they derive their existence. NLRB v. Atlanta Metallic Casket Co., 205 F2d 931, 936 (CA5 1953).

B. The Surface Resources Act of 1946, 69 Stat. 368, 30 U.S.C. Sec. 613(c) makes the Secretary of the Interior's jurisdiction to hear and determine cases arising under that act depend upon the Secretary's compliance with the "then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States." Sec. 613(c) requires that if a "mining claimant files a verified statement", then "the Secretary of the Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims." It requires further in mandatory language:

> "The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States." 30 U.S.C. Sec. 613(c), Appendix 89.2/

2/The legislative history makes clear that the Department of the Interior is required to follow

The then established procedures of the Department of the Interior with respect to contests were (and still are) found in 43 Code of Federal Regulations. We have cited the regulations with the numbering of sections in effect as of January 1, 1962, as was argued to the courts below. The regulations have not changed materially, except for the numbering of sections in the 1968 edition, where part 221 appears as 1852.

C. Agriculture and Interior failed to comply with the procedures required by the regulations in three particulars:

1) There was no complaint. The Court of Appeals erred in adopting by reference the ruling of the District Court that "the use of a complaint

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2/ (continued)
established procedures with respect to contests affecting public lands. Report No. 730 of the House Committee on Interior and Insular Affairs, emphasizes this point as follows:

> "Such hearings would, under the bill, follow the established general procedures and rules of practice of the Department of the Interior with respect to contests or protests affecting public lands." U.S. Code, Cong. and Admin. News, 84th Congress, 1st Session 1955, Vol. 2, p 2385. (Emphasis supplied).

is averted by the publication requirement of the statute, A33, for the notice published under 30 U.S.C. Sec. 613(a) cannot function as a complaint, since it does not contain "a statement in clear and concise language of the facts constituting the grounds of contest," which is required by 43 CFR 221.54 A91.3/ The notice published under 30 U.S.C. Sec. 613(a) did nothing more than request mining claimants to file information as to: a) the date of their mining locations, b) book and page where notice is recorded, c) sections in which claims are situated, d) whether claimant is locator or purchaser, and e) name and address of claimant and persons having interest in the claim.

2) There was no certificate of title. The Court of Appeals, adopted by reference the finding of the District Court that "No request for publication was accompanied by the required certificate of title or abstract of title. Here the plaintiffs are technically correct..." A32-33. "Consequently, the Court erred in failing to reverse summary judgment for the Secretary. A certificate of title is required to accompany the statutory letter initiating the proceeding. The title certificate of an attorney for the Department is sufficient, if it is based on tract indexes of mining claims in the county records. If there are not tract indexes, the certificate of title must be prepared by a title or abstract company or title abstractor. 30 U.S.C. Sec.613(a).

3/ 43 CFR 221.68 requires that "The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests. A92.

The legislative history shows that Congress intended to make a title search mandatory.

> "...a copy of the notice must be mailed by registered mail to each person who is shown by a title search to have an interest in the lands." U. S. Code, Cong. and Admin. News, 84th Cong. 1st Session, 155, Vol. 2, p. 2485 (emphasis supplied).

A "certificate of non-existence of tract indexes" R 238,is no substitute for a "certificate of title" under 30 U.S.C. Sec. 613(a).

It is impossible to reconcile the certificate of Mr. Clarke that there are no tract indexes, R 238, with the affidavit of Ralph L. Warstell, R 240, that he mailed a notice to each of the mining claimants", whose name and address is set forth in the certificate of examination of tract indexes relating to land described in said notice."

There was no service of publication. The Court of Appeals adopted the finding of the District Court that "A copy of the publication was not served on the mining claimant, as demanded by the statute." A33. Therefore it erred by failing to set aside summary judgment for the Secretary. 30 U.S.C. Sec. 613(a) provides that:

> "Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed as aforesaid, and shall cause a copy of such notice to be mailed by registered mail to each person

whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed." (Underscoring supplied).

Section 613(e) provides:
"If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person." (Underscoring supplied).

The Surface Resources Act makes mandatory that the prosecuting agency "shall" cause a copy of the publication to be mailed to persons listed in a certificate of title accompanying its statutory letter to the Department of the Interior. 30 U.S.C. Sec. 613(a).

It would seem clear that Congress intended that failure to comply with this statutory condition would render the attempted publication a nullity. The legislative history is as follows:

"Subsection (e) of Section 5 provides that the publication of notice shall be wholly ineffectual as to any person entitled to be served with, or to be mailed a copy of the published notice, if the notice is not in

fact so served upon or mailed to him." U.S. Code, Cong. and Adm. News, 84th Congress, 1st Session, 1955, Vol. 2 p. 2486.

Congress undoubtedly had in mind the protection of bona fide claimants when it spelled out in the act the safeguards the Surface Resources Act to be followed. On the one hand, it wanted to invalidate fraudulent claims; on the other, it recognized that bona fide claimants would suffer from agency harrassment. The legislative history is recorded as follows:

"On the other hand, continual interference by Federal agencies in an effort to overcome this difficulty would hamper and discourage the development of our mineral resources, development which has been encouraged and promoted by Federal mining law since shortly after 1800." U.S. Code, Cong. and Admin. News, 84th Congress, 1st Session, 1955, Vol. 2, p. 2479.

The intention of Congress is defeated and the statute becomes meaningless if one by one technical safeguards commanded by the mandatory "shall" are disregarded. Lifting limitations on administrative power might very well result in its abuse. Agency power enforcing its edicts is not law when it transcends the limits of lawful authority, even when acting in the name and wielding the force of the Government. Hurtado v. California, 110 U.S. 516, 536.

The Administrative Procedure Act, makes mandatory that no process shall be enforced in any manner or for any purpose, except as authorized by law. The act provides: "Process, requirement of a report, inspection or other investigative act or demand may not be issued,

made, or enforced in any manner or for any purpose except as authorized by law." 5 U.S.C. Sec.1005 (b). And Sec. 1008 (a) of the act provides: "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law." (Emphasis supplied)

The Administrative Procedure Act must be read as a part of every Congressional delegation of authority, unless specifically excepted. Hotch v. U.S., 212 F2d 280, 283. And in Wong Yang Sung v. McGrath, 339 U.S. 33, 35-53, it was held that proceedings to which the act applies must conform to the procedural safeguards enacted by the act if resulting orders are to have validity.

An administrative agency is a tribunal of limited jurisdiction which may exercise only the powers granted by statute reposing power in it. The Pentheny Limited v. Government of Virgin Islands, 360 F2d 786, 790 (CA 3) 1966. And when Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. Stark v. Wickard, 321 U.S. 288, 309.

The power of an administrative officer is limited to carrying out a law according to its terms. Fidalgo Island Packing Co. v. Phillips, 120 F Supp 777, 781 Aff. 230 F 2d 638, rehearing denied 238 F2d 234, Cert. denied 352 U.S. 944. Hence an attempted investigation by an agency lacking legal sanction has no better standing than an interloper. McMann v. S. E. C., (CA 2) 87 F2d 377, 379, 109 ALR 1445, cert den. 301 U.S. 685. Railroad Comm. v. Houston Natural Gas, 186 SW2d 117, 121.

SECOND: CONVERSE WAS DENIED DUE PROCESS BY AGENCY FAILURE TO APPRISE HIM BY COMPLAINT OF THE ISSUES BEFORE TRIAL, BY FORCING HIM TO TRIAL BY AN EXAMINER WHO HAD PREJUDGED HIS CASE, AND BY PROHIBITING HIM FROM MAKING OFFERS OF PROOF.

A. Converse was not notified of the issues to be tried until about the middle of the trial. The Examiner said: "The issue is whether or not there is a valid discovery as of July 23, 1955."

The right to notice before trial of the issues to be tried is constitutionally protected under the "Due Process" clause.

Basic to the very idea of free government and among the immutable principles of justice which no State may disregard is the necessity of due "notice of the charge and adequate opportunity to be heard in defense of it". Powell v. Alabama, 287 U.S. 45, 68 (1932); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). Consequently, where a state appellate court affirmed a conviction on a violation of Section 1 when the accused was charged with a violation of Section 2 of the law, it was held that the affirmance on a different charge than the one upon which the accused was charged is a denial of due process as a conviction upon a charge that was never made. Cole v. Arkansas, 330 U.S. 196, 202 (1948). The Supreme Court has observed that due process of law requires that the proceeding shall be fair. Snyder v. Massachusetts, supra.

B. The Examiner prejudged the case. Before the commencement of the trial, Mr. Converse filed a motion for change of hearing examiner, supported by affidavit averring that the examiner had prejudged his case.

"Mr. Murray: Mr. Hearing Examiner, for the purpose of the record at this time, we would like to file under the Administrative Procedure Act, Title 5, Section 1006(a), a motion to change the Hearing Examiner, supported by the affidavit of Mr. Ford Converse.

. . . .

Hearing Examiner: I don't deny the facts. I just deny the motion. You may make an offer of proof, if you care to."

C. Converse was denied a trial, since he was prohibited from making offers of proof for the record. "Due Process" was denied Converse. Requests for leave to make offers of proof under the rule as to Walcott (Tr. 174), Converse (Tr. 24, 25), Suchy (Tr. 58-61) and Persons (Tr. 143, 148), were denied by the Hearing Examiner. Exceptions to the rulings of the Hearing Examiner were taken. (Tr. 148-150).

"MR. MURRAY: It's tantamount to a denial of due process to refuse to permit a Mining Claimant in a proceeding of this kind the right to introduce his evidence. Certainly, it might be objectionable evidence in the view of the Examiner, but, in the view of a reviewing body on appeal, it might be deemed proper evidence. But to prohibit the Mining Claimant from making his record, certainly, is a denial of due process."

It was the duty of Converse to obey the rulings of the Hearing Examiner and refrain from stating in the record what he proposed to prove. His remedy was to appeal.

In Downie v. Powers et al, 193 F2d 760, 768 (10th Cir. 1951), it was held that the spirit of the mandate of the Rule 43(c), 28 USCA, permitting offers of proof of excluded testimony to be made for the record cannot be ignored. The purpose of the rule permitting the examining attorney to make a specific offer of what he expects to prove by the witness' answer to an excluded question is to enable the examining attorney to make such a record that an Appellate Court can determine whether there was reversible error in excluding the question. See Moore's Federal Practice, Vol. 3, p. 3076.

In Pennsylvania Lumberman's Mutual Fire Insurance Co. v. Nicholas, 253 F2d 504, the Court said at p. 506:

> "Appellants also complain of the refusal of the trial court to permit them to prove or even make their proffer of proof as to certain of their other defenses. Of course, any evidence they wish to tender that would tend to establish their defenses should be received by the Court, and as to any which the Court considers irrelevant, immaterial or otherwise improper, the parties must be given ample opportunity to put in the record a fair statement so that the Appellate Courts can intelligently pass upon the challenged rulings of the trial court."

THIRD: THE ULTIMATE AGENCY FINDING THAT NO MINERAL DISCOVERY HAS BEEN MADE IS NOT CONCLUSIVE WHERE THE BASIC FACTS FOUND ESTABLISH DISCOVERY AS A MATTER OF LAW.

A. In this review of administrative proceedings, we have not asked the courts to weigh the evidence. No matter how heavily the evidence weighs in favor of the Mining Claimant, the Hearing Examiner has the power to reject it. And the Courts are bound by his findings if these are supported by any evidence. If we accept the conclusion that no discovery had been made as being an ultimate finding of fact, although specific findings of fact establish the contrary, then the Secretary could invalidate any mine by this method, no matter how rich, for want of discovery.

We have tried to make clear that we are concerned here with findings of basic facts which establish that discoveries were made, as distinguished from findings of ultimate fact. If the findings of basic facts contradict the finding of ultimate fact or conclusion, then the conclusion has no validity.

As requested by Converse, the Hearing Examiner made basic findings of fact as to the Paymaster and with respect to the area on the Edith exposed by Converse before July 23, 1955.

These facts as found show no resemblance to the kind of property described in United States v. Iron Silver Mining Co., 128 U.S. 673, where mere indications of mineralization in lodes which could not be clearly ascertained did not evidence discovery. The Converse claims did not show mere indications or scattered bits of

mineralization, but a substantial lode of sulphide mineralization with assays showing high values.

As to the area exposed and sampled after July 23, 1955, the Examiner refused to make findings, and those values were not included in the findings mentioned above.

We are concerned with finding basic facts as distinguished from finding ultimate facts. The reasons for requiring the basic facts to be found is explained in Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F2d 554 Cert. den. 59 S.Ct. 72:

> p. 559, "The requirement that courts, and commissions acting in a quasi judicial capacity, shall make findings of fact as a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extra legal considerations; and findings of fact serve the additional purpose where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law, or, on the contrary, upon arbitrary or extra legal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact, the reviewing tribunal can determine

> neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts."
> p. 560, "We now rule that findings of fact to be sufficient to support and order, must include what have been described above as the basic facts from which the ultimate facts in terms of the statutory criterion, public convenience interest or necessity are inferred . . . ."

Mr. Justice Douglas has admonished us that, "Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal." New York v. U. S., ICC et al, 342 U.S. 882, 884, 72 S.Ct. 152, 153.

The Court of Appeals, like the District Court, erroneously assumed that "Manifestly, the testimony of the Government's witnesses was sufficient to create a prima facie case in favor of the Government's position" Ap. A 36. But our problem here is not to weigh evidence; it is to apply the law to the findings, which have not been challenged, and which have been repeatedly affirmed.

BASIC FINDINGS AS TO THE EDITH CLAIM

B. The land on which the Edith is located is mineral in character. Finding No. 2

A lode was discovered in a sulphide zone[4/] on the Edith claim. It has not been investigated to any extent, and it is yet to be determined whether the lode will produce large or small quantities of commercial ore. The fact that the sulphide zone does exist is one of the favorable criteria for the development of the Edith. Finding No. 3, Tr. 75, 76.

Samples taken from or near the cut near the center of the Edith claim were chip samples from the mineral parts of the vein at the places indicated by red circles on exhibit 28, Tr. 22. They assayed as follows:

Exh.No.	Sample No.	Au. oz.	Ag. Oz.	Pb. %	Zn. %	Cu. %	Value per Ton
28	1	0.12	0.96	0.43	nil	4.5	$ 30.86
28	2	0.10	nil	56.78	nil	nil	150.00
28	6	0.005	0.5	1.3	1.5	0.15	7.64
28	6	0.03	0.7	nil	2.4	1.11	13.12
28	8	0.005	0.7	1.0	1.7	0.13	8.30
28	21	Tr	Tr	0.50	2.10	0.50	8.60

Finding No. 7, Exhibit 28, Tr. 23.

Mr. Smith, a prospector, took a 15 pound piece of rock (Ex 33) 40 feet above the place where the road crosses the Edith claim. The rock was exposed as an outcrop and was not ex-

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4/ "Sulphide zone" is defined as "That part of a lode or vein not yet oxidized by the air or surface water and containing sulphide minerals." American Geological Institute Dictionary of Geological TErms, Doubleday & Company, Inc., N.Y. (1962).

posed by road work. Tr. 186. It was stipulated that the rock, Ex. 33, weighs about 15 pounds and is about 20% sulphides, consisting of 7 to 10 per cent lead and from 10 to 15 per cent zinc." Finding No. 12.

BASIC FINDINGS AS TO THE PAYMASTER CLAIM

C. The land on which the Paymaster is located is mineral in character. Finding No. 2.

A lode was discovered in a sulphide zone on the Paymaster claim. It has not been investigated to any extent and it is yet to be determined whether the lode will produce large or small quantities of commercial ore. The fact that the sulphide zone does exist is one of the favorable criteria for the development of the Paymaster. Finding No. 3, Tr. 75, 76.

Sample No. FC-10 was taken in the adit on the Paymaster claim by Mr. Holmgren (Tr. 108, Exh. J). Samples Nos. 1, 2, 4 and 18 were taken by the Mining Claimant, or under his direction, in the same adit, as is shown by Exhibit 27. Numbers circled in red on the map, Ex. 27, show the places where the samples were taken. The samples were assayed with results as follows:

"Tr. p.	Ex. No.	Samp. No.	Au. oz.	Ag. oz.	Pb. %	Zn. %	Cu. %	Value per ton
108	Ex J	FC-10	0.38	1.3	2.6	5.0	0.20	$ 29.57
	Ex 27	1	nil	nil	61.2	nil	0.35	167.88
	Ex 27	2	0.07	2.9	25.9	nil	nil	61.72
140	Ex 27	4	0.16	3.00	16.60	12.50	.40	71.51
	Ex 27	18	0.49	1.50	0.50	9.10	0.50	40.35"

About 50 years ago, Mr. Converse took from the Paymaster adit Exhibit 34, and based upon stipulation, it was agreed that this sample weights approximately three pounds and contains 60% lead and 20% zinc. Finding No. 15, Tr. 221, 222.

D. Comparison of minerals on the Edith and Paymaster claims with the national average values of similar ores mined in the United States shows that the average values of minerals discovered on the claims is several times as high.

The five year average prices for these metals from 1957 through 1961 were: gold $35 an ounce, silver 90¢ a pound, copper 29.7¢ a pound, and zinc 11.62¢ a pound. (Suchy Tr 46). The average values of ores mined in the United States were: copper $6 per ton, lead $12 to $15 per ton, zinc $12 to $15 per ton. (Holmgren, Tr 117, 118).

E. Discovery was established by the basic findings under the "prudent man rule" of Castle v. Womble, 19 L.D. 455 (1894) :

> "After a careful consideration of the subject, it is my opinion that where minerals have been found and the evidence is of such a charjacter that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belong-

ing to the United States... are... declared to be free and open to exploration and purchase'. For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do."

This rule has been followed in Chrisman v. Miller, 197 U.S. 313, 322; Cameron v. United States, 252 U.S. 450, 459; Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-336, and in United States v. Coleman, 390 U.S. 599.

We should keep in mind that the standards to be applied in determining what a prudent man would or would not do are not those of a trained engineer or geologist and are not even necessarily determined by the prudence of a skilled miner. Snyder v. Udall, 267 F. Supp. 110 (USDC Colo. 1967). Moreover, Converse had the lawful right, as a prudent man, to rely on the advice of Milvoy Suchy, mining engineer for Forestry, when Mr. Suchy advised him to spend further time and money on the claims. Rummell v. Bailey, 7 Utah 2d 137.

The decisions below erred in equating the kind of further work that the mineral discoveries made on the Converse claims justify with prospecting, which is the search for a yet undiscovered ore body, not the further exposure of an ore body that has been found. The mineral ex-

aminer who recommended to Mr. Converse that he do further exploration on the claims to determine the extent of the ore body that had been found, stated that "exploration" and "development" work overlap. Tr 89, 90, 85. He did not speak of "prospecting", but of revealing further what had already been exposed and sampled.

Only one discovery of minerals within the boundaries of a mining claim is sufficient to establish a discovery under the law. 43 CFR 185.25; Union Oil Co., in review, 25 L.D. 351; Nome & Sinook Co. v. Snyder, 187 Fed 385; Hall v. McKinnon, 193 Fed. 572; Cook v. Klonos, 164 Fed. 529, 537.

As a matter of law, the Department has upheld discovery in U.S. v. Woodard, Oregon contest 172173 (1957), where a discovery with assay values from $4 per ton for a 50 inch sample to $28.29 per ton for a ten inch sample in a vein structure was held sufficient to justify the belief that there was a reasonable prospect of success in developing a mine. Likewise, in U.S. v. Belisle, Colorado 034358 (1966), a case under the Surface Resources Act, the Department held that ore having a value of $20 per ton is a working proposition. Samples near the furface contained minerals higher than $20 per ton. One sample showed values of $49.90 per ton. These findings were held to establish a mineral discovery as a matter of law and successfully refuted the prima facie case established by the Forestry Service.

Certainly, the basic findings made in Converse that the Edith and Paymaster claims contain lodes which assayed values in gold, silver,

copper, lead and zinc well above the national averages for such ores mined in the United States, and that a prudent man would be justified in spending further time and means to do more work on the lodes actually discovered, to bulldoze and drift on the veins to reveal further their extent, call for the conclusion that location of the claims was properly supported by mineral discovery.

CONCLUSION

Congressional policy long has encouraged the discovery of ore reserves. Subsidies have been enacted to facilitate mineral exploration. For example, the program of financial assistance in approved exploration projects carried on by the Office of Minerals Exploration and the income tax regulations which encourage investment in mineral exploration stimulate the search for larger reserves of the ores which this nation's industries and defense preparations call for steadily. The Department of the Interior also does much good work to carry out this congressional policy through the United States Geological Survey and the Bureau of Mines.

Yet the actions of some agencies appear to frustrate that policy. See Government Initiated Contests against Mining Claims--A Continuing Conflict, Utah Law Review, Vol. 1968 No. 1, p. 114.

In these times of critical shortages of metals, a restatement of the law of discovery of minerals of intrinsic value is needed now.

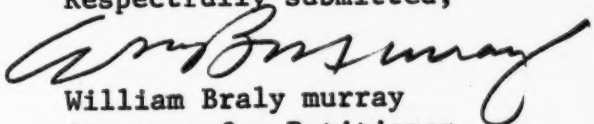
It would be most appropriate for this honorable Court to assume jurisdiction in this case.

Converse represents a long administrative step away from established law, both procedural and substantive. The decisions below uphold the agency's disregard of the statutory safeguards which Congress said should be observed in the administration of the Surface Resources Act. Furthermore, the decisions below depart from the traditional standards for evaluating the sufficiency of mineral discovery.

For the reasons stated, this case should be remanded for dismissal.

We pray that the petition for writ of certiorari be allowed.

Respectfully submitted,



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APPENDIX A

OPINION BELOW

No. 21,697 -- August 19, 1968

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ford M. Converse, Appellant, vs. Stewart L. Udall, Secretary of the Interior, Appellee.	)	No. 21,697

On Appeal from the United States District Court for the District of Oregon

Before: KOELSCH and DUNIWAY, Circuit Judges, and PREGERSON, District Judge*

DUNIWAY, Circuit Judge:

Converse appeals from a judgment upholding a decision of the Secretary of the Interior. The Secretary's decision is reported at 72 Interior Dec. 141 (1965); that of the District Court is reported in Converse v. Udall, D. Ore., 1966, 262 F.Supp. 583. This opinion assumes familiarity with those decisions. We affirm.

In 1955 (P.L. 167, 69 Stat. ch. 375, p. 367) Congress adopted an Act commonly called The Sur-

*Honorable Harry Pregerson, District Judge, Central District of California, sitting by designation.

face Resources Act. Section 4 (30 U.S.C. Sec. 612) reserves to the United States, as to unpatented mining claims located after July 23, 1955, the effective date of the Act, the right to manage and dispose of the vegetative surface resources and to manage other surface resources, except mineral deposits subject to location. Section 5 (30 U.S.C. Sec. 613) sets up machinery for determining, as to any unpatented claim located before that date, "the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 4 of this Act. . . ." (69 Stat. p. 371). The Act further provides, in section 7 (30 U.S.C. Sec. 615): "Nothing in this Act shall be construed in any manner to limit or restrict or to authorize the limitation or restriction of any existing rights of any claimant under any valid mining claim heretofore located, except as such rights may be limited or restricted as a result of a proceeding pursuant to section 5 of this Act." (69 Stat. p. 372). One of the purposes of the Act was to eliminate some of the abuses that had occurred under the mining laws. H.R. Rep. 730, 84th Cong., 1st Sess., 2 U.S. Code Cong. & Ad. News, 2474, 2478 (1955). See Coleman v. United States, 9 Cir., 1966, 363 F.2d 190, 197, rev'd on other grounds, United States v. Coleman, 1968, 390 U.S. 599; Funderberg v. Udall, 9 Cir., 1968, ... F.2d...., (No. 21,884, decided June 11, 1968). But Congress did not intend to change the basic principles of the mining laws. H.R. Rep. 730, supra at 2480.

The claims in question being located in a National Forest, the Forest Service, acting under Section 5 of the Act, instituted before the Department of the Interior the proceedings that

have culminated in the present appeal.

The Hearing Examiner did not hold that Converse's unpatented claims are void. He merely held that, as of July 23, 1955, a valid discovery had not been made on them, and that therefore the limitations of Section 4 of the Act apply to the claims. Converse still has his claims, can work them, and can apply for a patent. The Hearing Examiner's decision has been affirmed three times, once by the Assistant Director, Bureau of Land Management, once by the Assistant Solicitor, acting for the Secretary, and once by the District Court.

1. Jurisdiction

Appellant asserted that jurisdiction is conferred on the District Court by the Administrative Procedure Act (now 5 U.S.C. Sec. 701), the Declaratory Judgment Act (28 U.S.C. Secs. 2201-2), the Act of June 25, 1948, relating to federal questions (28 U.S.C. Sec. 1331), and the Act of October 5, 1962, (28 U.S.C. Secs. 1361, 1391). The Declaratory Judgment Act does not confer jurisdiction, Skelly Oil Co. v. Phillips Petroleum Co., 1950, 339 U.S. 667, nor does section 1391, which deals with venue. The Secretary contends that the Administrative Procedure Act does not apply, but concedes the applicability of 28 U.S.C. Sec. 1361. However, we have held that the Administrative Procedure Act does apply, Adams v. Witmer, 9 Cir., 1958, 271 F.2d 29, 32-33; Coleman v. United States, supra, 363 F.2d at 194. The portion of our decision in Coleman dealing with the Administrative Procedure Act was not questioned by the Supreme Court. See also Foster v. Seaton, D.C. Circ., 1959, 271 F.2d 836, cited

with apparent approval in Best v. Humboldt Mining Co., 1963, 371 U.S. 334, 338 n. 7. Cf. Chournos v. United States, 10 Cir., 1964, 335 F.2d 918. We think that a federal question is involved, (Butte & Superior Co. v. Clark-Montana Realty Co., 1919, 249 U.S. 12, 22-23), that the Court had jurisdiction under section 1331 and the Administrative Procedure Act, and that venue was proper under section 1391. We do not decide whether jurisdiction also exists under section 1361.

2. Non-substantive Questions.

Converse asserts that there were many procedural errors in the administrative proceedings, and that the Hearing Examiner was biased and prejudiced. All of these claims are carefully and correctly considered and disposed of in the opinion of the District Court and we do not discuss them further.

3. The Proper Legal Standard of "Discovery".

Converse argues that the evidence does not support the decision, and that an improper legal standard was applied. We have reviewed the evidence and the findings, and we conclude that the latter are fully supported.[1] The only substantial

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[1]The Secretary argues that, on questions of fact, the decision of the Secretary, based on substantial evidence, is conclusive, in the absence of fraud or imposition. This position is a retreat from that taken in Coleman v. United States, supra, 363 F.2d at 194, where the rule proposed left out the phrase "based on substantial evidence." We think that the proper rule is that stated in the Administrative Procedure Act, 5 U.S.C. Sec. 706(2)(E)--whether the findings are supported by

question is whether the legal standard applied was proper. We hold that it was.

The Act of 1955, as we have seen, provides for a determination of "the validity and effectiveness" of mining claims, (Sec. 5(c)) in connection with a request "for determination of surface rights." (Sec. 5(a)). It specifically refers to mining claims "heretofore located". (Secs. 5(a), 5(b), 5(d), 6, 7.) This we take to mean before July 23, 1955, the effective date of the Act. But there is no definition in the Act of "validity" or "effectiveness". For this we must look elsewhere.

Ever since the adoption of the General Mining Law of 1872 (17 Stat. 91), the statutes have permitted location of "Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits," and has required, as to claims located after May 10, 1872, "the discovery of a vein or lode within the limits of the claim located." (30 U.S.C. Sec. 23, formerly R.S. 2320, Sec. 2 of the Act of 1872). And the law provides for the obtaining of a patent "for any land claimed and located for valuable deposits" (30 U.S.C. Sec. 29, formerly R.S. 2325, Sec. 2 of the Act of 187 1872). Thus the only statutory standard has been and still is the "discovery" of "veins or lodes" containing "valuable deposits" of the named metals or others. The Congress has left implementation of this standard to the Executive and the Courts.

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1 (continued) substantial evidence. See Henrikson v. Udall, 9 Cir., 1965, 350 F.2d 949; Foster v. Seaton, D.C. Cir., 1959, 271 F.2d 836; Palmer v. The Dredge Corp., 9 Cir., 1968, ... F.2d ..... (No. 21435/6, decided June 26, 1968).

All of the cases hold that whether the statutory requirements have been met is a question of fact.[2] To guide the fact finder, the Department and the courts long ago developed what has come to be called the "prudent man" test, much as the courts have developed the "reasonable man" test to guide the fact finder in negligence cases.

In 1905, the Supreme Court in Chrisman v. Miller, 197 U.S. 313, 322, approved and adopted the "prudent man" test as developed by the Land Department and stated by it in Castle v. Womble, 19 L.D. 455, 457 (1894), as follows:

> "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

In so doing, the Court (at 321) quoted with approval from United States v. Iron Silver Mining Co., 1888, 128 U.S. 673, 683, where Mr. Justice Field, speaking for the Court said:

> "It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

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[2]E.g., Lange v. Robinson, 9 Cir., 1906, 148 Fed. 799, 803; Cascaden v. Bortolis, 9 Cir., 1908, 162 Fed. 267, 271.

Thus it was made clear as long ago as 1888 that the finding of some mineral, or even of a vein or lode, is not enough to constitute discovery--their extent and value are also to be considered.

The Castle v. Womble definition has been approved by the Supreme Court several times, e.g., Cole v. Ralph, 1920, 252 U.S. 286, 299; Cameron v. United States, 1920, 252 U.S. 450, 459; Best v. Humboldt Placer Mining Co., 1963, 371 U.S. 334, 335-36; United States v. Coleman, 1968, 390 U.S. 599, 602. This court has often applied the definition. Lane v. Robinson, 9 Cir., 1906, 148 Fed. 799, 803; Charlton v. Kelly, 9 Cir., 1907, 156 Fed. 433, 436; Cascaden v. Bortolis, 9 Cir., 1908, 162 Fed. 267, 268; Adams v. United States, 9 Cir., 1963, 318 F.2d 861, 870.

The decisions also make it clear that the standard is more liberally construed in favor of a first locator when the contest is between him and a second locator than in contests between a mineral locator and another party who challenges the mineral nature of the lands. Chrisman v. Miller, supra, 197 U.S. at 323:

> "It is true that when the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority."

See also Lange v. Robinson, supra, 148 Fed. at 802. No doubt this accounts for the statements to be found in some of the cited cases indicating that, if the locator has found any minerals in the rock in place, he has made a discovery. Unless this be the basis for such statements, they are clearly contrary to what the Supreme Court said in Chrisman v. Miller, supra. Therefore we think that in this contest between Converse and the Forest Service the test should be strictly applied against Converse. Here, the decision does not deprive Converse of his possession or of the right to further explore his claim and make a valid discovery. It protects an important public interest, the right of the government, which still has paramount title, to manage valuable timber on the claims,[3] thus confining Converse to the sole purpose for which he can acquire a valid claim under the mining laws. United States v. Coleman, supra, 390 U.S. at 603. The Department has long applied the same rule to national forest lands that the court announced in Chrisman v. Miller regarding agricultural lands. Helen v. Wells, 1933, 54 I.D. 306; United States v. Dawson, 1944, 58 I.D. 670; United States v. Black, 1957, 64 I.D. 93; United States v. Dodson, 1959, I.D. case, No. A-27905; United States v. Amcol Mining & Milling Co., 1960, I.D. case No. A-28405. See also Cameron v. United States, supra, 252 U.S. at 463; United States v. Lavenson, D.C.W.D. Wash., 1913, 206 Fed. 755, 762-63; United States v. Lillibridge, D.C.S.D. Cal. 1932, 4 F. Supp. 204, 206. Some of these cases indicate that the discovery must be of such character as to show that there will be a paying or profitable mine. Here, however, the Secretary did not go so far.

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[3] The timber on the Converse claims is valued at more than $90,000.

In applying the prudent man test, the fact finder can consider whether the claims are in a producing area, are adjacent to or near successful mines, and are of similar character. (Lange v. Robinson, supra, 148 Fed. at 804; Cascaden v. Bortolis, supra, 162 Fed. at 269-70). It would seem that, if such facts can be shown in support of an inference that comparatively slight showings on the claim point to a reasonable prospect of success in the development of a valuable mine, then proof of their absence should also be considered as possibly supporting a contrary inference.

Converse attacks the Secretary for drawing a distrinction between "exploration", "discovery", and "development". But the authorities we have cited show that there is a difference between "exploration" and "discovery". (See, e.g., Cole v. Ralph, supra, 252 U.S. at 294, 296, 307). If the latter word were taken literally, then the findings of any mineral would be a "discovery". Webster, 2d Ed., defines "discover" as "to make known the identity of, . . . by laying open to view, as a thing hidden or covered, to expose; to disclose; to bring to light." But, as we have seen, that alone is not enough. On the other hand, Webster defines "explore" as "to seek for or after, to strive to attain by search." This is exactly what a prospector does, both before he finds the first "indications . . . of the existence of lodes or veins" (United States v. Iron Silver Mining Co., supra, 128 U.S. at 683) and thereafter until he finds enough mineralization to meet the legal test of a discovery. It is true that some of the cited cases say that "development" and "exploration" mean the same thing (Charlton v. Kelly, supra, 156 Fed. at 436), or speak of "exploration" after

discovery (Lange v. Robinson, supra, 148 Fed. at 804). But in each of these cases, the court was talking about further work to be done after a sufficient discovery had been made, work which could be called "exploration" or "further exploration," or could also be called "development." They do not support the attack here made upon the distinction between the exploration work which must necessarily be done before a discovery, and the discovery itself, which is what the Secretary talks about when he distinguishes between "exploration" and "discovery". The real question here is not whether there is such a distinction, but whether Converse's exploration had resulted in a legal discovery.

Finally, United States v. Coleman, supra, 390 U.S. 599, has significantly tightened the standard of Chrisman v. Miller, supra. Coleman involved stone, rather than metallic lodes. The Secretary required a showing that "the mineral can be 'extracted, removed and marketed at a profit'--the so-called 'marketability test'" (390 U.S. at 600). This court had disapproved that test as inconsistent with the long standing Chrisman v. Miller "prudent man" test. The Supreme Court reversed. Mr. Justice Black, speaking for a unanimour court, said:

> "Indeed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable'. It is a logical complement to the 'prudent man test' which the Secretary has been using to interpret the mining laws since 1894."

After restating the prudent man test, he continued:

"Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the cost of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact.

"The marketability test also has the advantage of throwing light on a claimant's intention, a matter which is inextricably bound together with valuableness. For evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes."

"Finally, we think that the Court of Appeals' objection to the marketability test on the ground that it involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent-man test is unwarranted. As we have pointed out above, the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former. While it is true that the market-

> ability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room to doubt that they can be extracted and marketed at a profit." (Pp. 602-3.)

We think it clear that the marketability test is applicable to all mining claims. We do not agree with Converse's argument that the last sentence that we have quoted means that marketability has no relevance in a case where the discovery is of precious metals. Such a holding would be contrary to Mr. Justice Field's rationale in United States v. Iron Silver Mining Co., supra, (128 U.S. at 683) and to the rationale of the prudent man test itself. It, too, concerns itself with whether minerals are "valuable in an economic sense." And that is the way that courts have long interpreted it. That is what Mr. Justice Field was writing about. So was Mr. Justice Brewer in Chrisman v. Miller, supra (197 U.S. at 322-23). So was Mr. Justice Van Devanter in Cole v. Ralph, supra (252 U.S. at 299) and in Cameron v. United States, supra (252 U.S. at 457). So were Judge Gilbert in Charlton v. Kelly, supra (156 Fed. at 436-37), Judge Hamley in Adams v. United States, supra (318 F.2d at 870), and Judge Madden in Mulhern v. Hammitt, 9 Cir., 1964, 326 F.2d 896, all speaking for this court.

To us, the cases indicate that the prudent man test, complemented by the marketability test, is to be applied with varying degrees of strictness, depending upon the relative positions of the parties to the case, i.e., against whom and for

what puruse the claim of discovery is asserted, e.g., Chrisman v. Miller, supra, and the type of minerals involved, i.e., precious metals, base metals, or minerals of widespread occurrence, e.g., Coleman v. United States, supra, 390 U.S. at 603. Here we deal with a contest between a locator and the government, which is asserting its interest in managing timber in a national forest, rather than a contest between locators. This factor, we think, calls for a somewhat strict application of the test. As we have noted, the prudent man test has long been strictly applied against one who asserts a discovery on national forest lands when the contest is between him and the government, as is the case here, e.g., Cameron v. United States, supra. Here, we also deal with a lode claim containing small values in precious metals, but principally base metals, copper, lead, and zinc. This second combination of factors, we think, calls for a somewhat less strict application of the test. We think that in such a case it is still the law that there need not be a full showing of marketability, such as the Secretary required in Coleman, supra. But the marketability test does permit the fact finder, even in the case of a showing of gold, to consider, somewhat more extensively than heretofore, the economics of the situation. Perhaps we could phrase the test this way: When the claimed discovery is of a lode or vein bearing one or more of the metals listed in 30 U.S.C. Sec. 23, the fact finder, in applying the prudent man test, may consider evidence as to the cost of extraction and transportation as bearing on whether a person of ordinary prudence would be justified in the further expenditure of his labor and means. But this does not mean that the locator must prove that he will in fact develop a profitable mine.

What, then, did the Secretary do? First, he correctly limited the issue--had there been a valid discovery before July 23, 1955? Consequently it was proper to limit the inquiry to what had then been found. See Cole v. Ralph, supra, 252 U.S. at 297-98, Cameron v. United States, supra, 252 U.S. at 456; Palmer v. The Dredge Corp., supra, n. 1, ... F.2d ..... Thus the Hearing Examiner was correct in receiving in evidence samples taken from the areas exposed by Converse before that date, even though the samples were taken thereafter, but excluding evidence relating to areas not then but thereafter exposed, including samples taken from those areas.

Second, the Secretary applied a proper test of discovery. The Hearing Examiner expressly followed the prudent man test; he did not purport to apply the marketability test. But he did take into account the economics of the situation. He considered the fact that the claims were first located by Converse's father in or before 1910, were abandoned shortly thereafter, and were not again relocated by Converse until 1951. He considered that the claims are within the Quartzville Mining District of Oregon, from which the only recorded production is of some gold and silver, mostly before 1900, with no production of any minerals since the second World War, and no recorded production of any base metals at all. He found that the mineralization that Converse and his father had found before the crucial date was slight, and insufficient to meet the prudent man test, particularly in the light of the remoteness and inaccessability of the claim.[4] If this

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[4]This situation changed with the construction of a road by the Forest Service in 1959. It was in areas exposed by that work that additional evidence of mineralization was later found.

be an application of a marketability test, we think it proper. Converse's father seems to have applied a similar test when he abandoned the claims in 1910. Nor is the finding made improper by the further finding that enough had been found to justify further exploration in the hope of making a legal discovery. As we have seen, this distinction is valid.

On the first ppeal, the Assistant Director applied the same test and expressly recognized that "A valuable mine need not be a profitable one." He added that, "Nevertheless, 'the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result.'" This expectation we take to be that of the mythical "person of ordinary prudence" postulated in the prudent man test. We note that he did not say proof that the mineral can be extracted at a proft, as in Coleman, supra. In the light of Coleman, we cannot hold that this test, as applied to this case, is erroneous. See also White v. Udall, 9 Cir., 1967, ... F.2d ..... (No. 21,766, decided June 17, 1968.)

On the second appeal, the Assistant Solicitor applied the same test, and noted the distinction between such a case as this and a contest between rival claimants. Again, we find no error.

AFFIRMED.

APPENDIX B

OPINION BELOW

Ford M. CONVERSE, Plaintiff,

v.

Stewart L. UDALL, Secretary of the Interior, Defendant.

INDEPENDENT QUICK SILVER CO., an Oregon corporation, Plaintiff,

v.

Stewart L. UDALL, Secretary of the Interior, Defendant.

Civ. Nos. 65-581, 65-590.

United States District Court
D. Oregon.

Sept. 14, 1966.

On Motion for New Trial
Nov. 30, 1966.

Actions to vacate decisions of Secretary of Interior whereby mining claims were held subject to restrictions of Surface Resources Act. On motions by both parties for summary judgment, the District Court, Kilkenny, J., held that decision of Secretary that government had surface management rights under Surface Resources Act until such time that patents were issued for mining claims was supported by substantial evidence.

Decisions affirmed.

William B. Murray, Portland, Ore., for plaintiffs.

Jack G. Collins, First Asst. U.S. Atty., and Sidney I. Lezak, U. S. Atty., Portland, Or., for defendant.

OPINION

KILKENNY, District Judge:

FACTS IN GENERAL

These cases are considered together, as they present many common questions of law and fact. The chain of events culminating in this review began with two hearings in Portland, United States v. Converse (Contest No. 011195-D) and United States v. Independent Quick Silver Co. (Contest No. 06189-A). The hearings were initiated by the Forest Service, United States Department of Agriculture, pursuant to Section 5 of the Act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. Sec. 613 (Supp. 1965).

[1] The statute, popularly known as the Surface Resources Act, provided in general that rights under any mining claim located after July 23, 1955, the date of the Act's passage, would be subject to the right of the United States to manage and dispose of surface resources other than mineral deposits. It also provided that no mining claim located after that date could be used, prior to the issuance of a patent, for purposes other than prospecting, mining and processing. The purpose of this statute was not to abolish mining claims or to significantly alter mining law, but to limit the use, or misuse, of surface resources (such as timber or peat) by a mining claimant prior to the issuance of a patent, and it applies only to mining claims located after July 23, 1955.

Consequently, if a mining claim was in all respects valid prior to July 23, 1955, it was not subject to the right of the United States to manage

and dispose of its surface resources. But because a mining claim is not considered valid until (a) the boundaries of the claim are marked and until (b) a discovery of a valuable mineral deposit has been made, it became necessary in many instances to make investigations and hold hearings to determine whether or not both of these prerequisites were met prior to the date of the Act's passage. The Act contained detailed provisions for these proceedings.[1] It was pursuant to these provisions that the two hearings here in question took place.

The first hearing, United States v. Converse, transpired June 11, 1962, and involved two mining claims.[2] The second hearing, United States v. Independent Quick Silver Co., took place October 1, 1962, and involved twenty-two mining claims.[3] Both of these hearings were presided over by Graydon E. Holt, hearing examiner for the Bureau of Land Management, who was then stationed at Sacramento, California.

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1. See 30 U.S.C. Sec. 613(a) to (e) (Supp. 1965).

2. Paymaster and Edith Lode, embraced within Secs. 1 and 2, T. 12S., R. 4 E., W.M., Oregon, (Willamette National Forest), Recorded in Book 8, Pages 214 and 215, Official Records of Linn County, Oregon.

3. Happy Chance, Prospect, Crystal, Pioneer, Ruby, Bonanza, Grub Stake, Zero, Good Luck, New Era, Lost Claim, Green Back, Columbia, Eastern Star, Cosmopolitan, Princess, Commodore, Aetna, Ajax, Aztec, Cornucopia and Jewell Mining Claims, embraced within Sections 17, 19, 20, and 21, T. 14 S., R. 20 E., W.M., Crook County, Oregon.

UNITED STATES v. CONVERSE

At the Converse hearing, the mining claimant Converse filed a motion to change the hearing examiner and filed an affidavit in support of that motion, charging the hearing examiner with bias and prejudice. The motion was denied because not timely filed, and the hearing continued. From the evidence adduced at the hearing, Hearing Examiner Holt concluded that the most favorable finding which could be made for the mining claimant was that there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed, but that there was not sufficient evidence of mineralization, as of July 23, 1955, to induce a prudent man to expend labor and means on either the Paymaster or Edith Lode claims with a reasonable expectation of developing a valuable mine. As a result, these two mining claims were held not to have been validated prior to passage of the Surface Resources Act, and were found to be subject to the limitations and restrictions of that Act.

This determination did not directly affect the mining claims themselves. The mining claimant still had the right to use the claims for mining purposes, and for any other purpose incidental to mining. The adverse determination to mining claimant Converse only precluded him from using the surface resources (including the timber on the claims, which the parties stipulated to have a value of $91,038.61) in a manner not incidental to mining, and made the claims subject to the right of the government to manage the surface resources, until a patent was obtained.

Following administrative regulations, claimant Converse appealed the decision of Hearing Examiner Holt to the Director of the Bureau of Land Management. He contended in substance that: a fair hearing was impossible because the examiner was prejudiced and had prejudged the case; he was entitled to a jury trial, and the administrative hearing was a deprivation of property without due process of law; the government had failed to establish a prima facie case, and he had affirmatively showed that a discovery had been made on each of the claims; the hearing examiner erred in holding that assays of ore samples taken by the mining claimant, after July 23, 1955, were inadmissible, while those taken by the contestant after the same date were admissible; and, the government's witnesses did not fairly sample portions of the claims alleged to have been opened prior to 1955.

On October 8, 1963, the Assistant Director, Bureau of Land Management, affirmed the decision of Hearing Examiner Holt. Claimant Converse then appealed to the Secretary of the Interior, reiterating essentially the same arguments that were contained in his appeal to the Director of the Bureau of Land Management, and adding the contentions that the Director erred in holding that "exploration and development", as used in mining laws are not synonymous, and that the Director either ignored or refused to accept the facts found by the hearing examiner. On March 26, 1965, the decision of the Assistant Director was affirmed by Ernest F. Hom, Assistant Solicitor of the Interior, pursuant to authority delegated by the Secretary of the Interior.

UNITED STATES v. INDEPENDENT
QUICK SILVER CO.

Five days prior to the Independent Quick Silver Co. hearing, the mining claimant mailed a motion for change of hearing examiner, together with a supporting affidsvit, charging bias, to Hearing Examiner Holt at his Sacramento office. The claimant argued that this was the first date that it knew Holt was going to hear the matter, but the claimant had been in correspondence with Holt, regarding the case, for some seven months prior to the hearing. This motion was denied by Hearing Examiner Holt at the outset of the hearing, on the grounds that the motion had not been timely filed as required by 5 U.S.C. Sec. 1006(a). The hearing then continued, and revolved around the charges that there had been no valuable mineral discovery on any of the twenty-two claims prior to July 23, 1955, and that the boundaries of the claims had not been distinctly marked on the ground. Hearing Examiner Holt held that, with respect to the Bonanza claim, a valuable mineral deposit had been found and that the claimant was entitled to surface rights on that claim. Regarding the other twenty-one claims, he found that the government had established a prima facie case in support of the two charges, which had not been refuted by the claimant. As a result, these twenty-one mining claims were held subject to the restrictions of the Surface Resources Act. Regarding the charge that the boundaries of the claims had not been distinctly marked on the ground, the hearing examiner found that the evidence indicated that there were only two known corner posts for the twenty-two claims involved.

Both the government and Independent Quick Silver Co. appealed from this determination by the hearing examiner. Independent Quick Silver argued that: the hearing examiner erred in failing to grant its motion for change of hearing

examiner; the hearing was a denial of due process and equal protection, and a taking of property without just compensation; the government failed to establish a prima facie case in support of the charges listed in the notice of hearing; the hearing examiner should have allowed its motion to exclude all of the assay reports of the government which were taken after 1955; it was proven by a preponderance of the evidence that discoveries existed on each of the claims involved; and, the examiner erred in failing to adopt certain of its requested findings of fact. The United States, in its appeal, argued that the hearing examiner had correctly found twenty-one of the claims subject to the limitations of the Surface Resources Act, but that the hearing examiner erred in failing to restrict the mining claimant's surface rights on a portion of the Bonanza claim after finding that the boundaries of that claim were not distinctly marked on the ground, and in finding that a discovery of a valuable mineral deposit had been made on a portion of the Bonanza claim.

On June 23, 1964, James F. Doyle, Chief of the Office of Appeals and Hearings of the Bureau of Land Management, affirmed the decision of Hearing Examiner Holt insofar as he held that the twenty-one claims were subject to the restrictions of the Surface Resources Act. The hearing examiner's determination that the Bonanza claim was not subject to the restrictions of the Act was reversed, however, and the government's assertions on appeal were adopted. Independent Quick Silver Co. then appealed this decision to the Secretary of the Interior, as provided for in the administrative regulations. On September 21, 1965, the decision of Doyle was affirmed in all respects by Ernest F. Hom, Assistant Solicitor of the Department of the Interior, pursuant to authority delegated by the Secretary of the Interior.

CONTENTIONS

Converse and Independent Quick Silver Co., as plaintiffs, are before this Court, in separate actions, in an attempt to vacate the decisions of the Secretary of the Interior, through his duly authorized Assistant Solicitor, whereby all the mining claims in question were held subject to the restrictions of the Surface Resources Act. Both parties have moved for summary judgment based on the record in the administrative file. Review of Secretary Udall's decision may be had under the Administrative Procedure Act, 5 U.S.C. Sec. 1009. Jurisdiction of this Court is based upon that section and upon 28 U.S.C. Sec. 1331. Venue is laid under 28 U.S.C. Sec. 1391(e). In both cases, plaintiffs make the following main contentions:

(1) that plaintiffs were denied due process, for they were compelled to try their cause before a hearing examiner who was biased as a matter of law and as a matter of fact;

(2) that due process was violated because the Secretary of the Interior lacked authority and jurisdiction, by his failure to follow Section 5(a) of the Act of July 23, 1955, 30 U.S.C. Sec. 613(a);

(3) that due process was violated because the Secretary's decision was based on charges different from those laid, for the hearing examiner switched the charges laid to a different charge during the hearing.

Plaintiffs then make several contentions which attack the merits of the two decisions. They are:

(4) that the government had failed in its burden of proof, as it did not establish a *prima facie* case by substantial evidence;

(5) that error had been committed in finding

the claims subject to the restrictions of the Surface Resources Act, as the record shows that a valuable deposit of ore was discovered on the claims prior to July 23, 1955.

The United States, as defendant in both these actions, contends that the decisions of the Department of the Interior holding that the government has the surface management rights until such time that patents are issued for the mining claims must be affirmed, as they are fully supported by substantital evidence in the administrative records.

DISCUSSION

Alleged Bias of Hearing Examiner Holt Independent Quick Silver Co.

In Independent Quick Silver Co., plaintiff insists that Hearing Examiner Holt was biased both as a matter of fact and as a matter of law. As its basis for arguing bias as a matter of law, plaintiff argues that the hearing examiner signed the Notice of Hearing, that the Notice of Hearing should be treated as a complaint in this case, and that, therefore, the hearing examiner both laid the charges and sat in judgment on his own charges. Plaintiff contends then, that this combination of the prosecuting and judging functions violates both the Administrative Procedure Act and the due process clause of the United States Constitution.

As its basis for arguing bias as a matter of fact, plaintiff calls attention to his motion for change of hearing examiner and supporting affidavit. At the outset of the hearing in question here, the mining claimant attempted to call the hearing examiner as a witness, in support of the charge that he was prejudiced and had pre-judged

the case. When the hearing examiner declined to testify, the mining claimant made an offer of proof "to prove that had Graydon Holt, the Hearing Examiner, testified, that he would have admitted that he had prejudged the case, and, therefore, was prejudiced." The hearing examiner then stated he would not comment on the offer of proof, and plaintiff argues that by passing over the matter without comment the hearing examiner admitted that the charge was correct.

The affidavit signed by the President of Quick Silver is set forth in the footnote.[4]

Plaintiff's motion for a change of hearing examiner was denied by Hearing Examiner Holt, on the ground that the motion was not timely filed as required by 5 U.S.C. Sec. 1006(a).

Converse

In Converse, plaintiff also argues that Hearing Examiner Holt was biased both as a fact and as a matter of law. As its basis for arguing bias as a matter of law, plaintiff utilizes the same argument made in Quick Silver, i.e. that, by signing the Notice of Hearing, Hearing Examiner Holt in effect signed the complaint, and thus took part in the prosecution of the case he later heard.

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4. "I have ascertained and therefore aver that Graydon E. Holt, Hearing Examiner, has never decided a mining case in favor of mining claimants with respect to the question of sufficiency of mineral discovery in any case involving Oregon lands. That the members of my Company are not agreed and feel that they can not have a fair and impartial trial of their case before Graydon Holt, Hearing Examiner."

The basis for arguing bias as a matter of fact is slightly different in this case. An affidavit was filed at the outset of the hearing, in which Converse stated that Hearing Examiner Holt had heard a previous case in which Converse was a mining claimant, and that the case was decided adverse to himself. The balance of the affidavit is set forth in the footnote.[5]

Attorney for plaintiff Converse made a motion for change of hearing examiner under the Adminstrative Procedure Act, 5 U.S.C. Sec. 1006(a), and asked to call Hearing Examiner Holt to testify in order to prove the averments in Converse's

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5. "That based upon the decision in that case and upon the conduct of the Examiner in that case, and upon my own independent investigation, I have concluded that said Hearing Examiner cannot try the above entitled case in an impartial manner, that he has prejudged my case and is unable to grasp any evidence which does not harmonize with his preconceived opinion of the matter. That for me to have a hearing before said examiner is a vain and useless gesture. That I am informed and believe that no mining claimant has ever prevailed in the State of Oregon in a contest of this kind and heard by Graydon E. Holt. That I am convinced that if said examiner is permitted to hear my case, that he will ignore the facts, refuse to make findings in accordance with the evidence, and will decide the case against me to please his superiors; that he will exercise no independent judgment of his own but will subordinate the merits to politically dictated policy."

affidavit. The motion for change of hearing examiner was denied, on the ground that it had not been timely filed, and Hearing Examiner Holt refused to testify. The following colloquy then took place between the hearing examiner and Murray, attorney for plaintiff Converse:

> "MR. MURRAY: Do I understand that the Hearing Examiner refuses to testify as a witness in support of the facts averred in the affidavit here?
>
> HEARING EXAMINER HOLT: That's correct.
>
> MR. MURRAY: And does the Hearing Examiner deny the offer of proof that we propose to prove by the testimony of the Hearing Examiner as to the facts averred in the affidavit?
>
> HEARING EXAMINER HOLT: I don't deny the facts. I just deny the motion. You may make an offer of proof, if you care to."

Plaintiff Converse argues that the hearing examiner's statement, "I don't deny the facts," is an admission of the truthfulness of all the allegations set out above in the affidavit, and that it, therefore, establishes bias in fact.

The Applicable Law

[2,3] In N.L.R.B. v. Acme-Evans Co., 130 F.2d 477, 482 (7th Cir. 1942), the Court stated: "The heat of the contest has, we think, led respondent to attribute bias because of the intensity of its own feeling." Those words seem appropriate here, for when the assertions of bias in these cases are closely scrutinized, it seems quite clear that intense feelings are all plaintiffs have been able to muster. The briefs, especially on this point, are pregnant with inference, innuendo, and inapplicable (or non-existent) law, but

woefully lacking in anything else. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. United States ex rel. De Luca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954). Plaintiffs, in my opinion, have fallen far short of meeting this test and, conversely, the record indicates that their hearings were conducted fairly and impartially by Hearing Examiner Holt.

[4] A hearing examiner is not biased, either in law or in fact, simply because he previously ruled against one of the parties. N.L.R.B. v. Donnelly Garment Co., et al., 330 U.S. 219, 67 S.Ct. 756, 91 L.Ed. 854 (1947). In the light of this opinion, Converse's allegation that Hearing Examiner Holt had ruled against him in a previous case, is, in itself, of no importance.

[5] The allegations in the affidavits that the examiner had never decided a case of this type in favor of mining claimants, are belied by the record which contains copies of findings prepared by the examiner in which he decided wholly or partially in favor of mining claimants in cases involving Oregon land. But, even if we were to assume that Hole was predisposed in favor of the government in such actions, the fact remains that the bias has to be personal in order for them to prevail.[6]

Anyway, plaintiffs have not even attempted to show personal bias on the part of Hearing Exam-

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6. "It has been held that the bias or prejudice alleged must be 'personal', and that a mere prejudgment of the case is not sufficient." Marquette Cement Mfg. Co. v. F.T.C., 147 F.2d 589, 592 (7th Cir. 1945).

iner Holt. He was most solicitous of their feelings at the hearing, and overruled most of defendant's objections, while at the same time sustaining plaintiffs on many of the "grey" points. In Converse, as an example, Holt excused one of plaintiff's witnesses after a lengthy direct examination, and stipulated that cross-examination could be taken at a later date, because the witness did not want to continue on the stand and had had heart trouble in the past. Hearsay evidence for plaintiffs by Holt, over objections by government counsel. In short, he, throughout both hearings, went out of his way to accommodate plaintiffs.

[6] The rule that applies to federal judges does not here apply. One of the leading authorities in administrative law, states:

> "Unlike federal district judges, examiners and other officers participating in decisions are not forced to withdraw upon the mere filing of a sufficient affidavit." Davis, Administrative Law Text, p. 223.

[7,8] Plaintiffs' argument that Holt, by signing the notice of hearing, was combining the functions of a prosecutor and a judge, thus violating both the Administrative Procedure Act and due process, is completely specious. These notices of hearing did nothing more than notify the plaintiffs of the issues to be dealt with at the subsequent proceedings. The fact that Holt signed such documents, and later presided at the hearing, is no more a violation of due process than the pre-trial orders federal judges sign every day. Moreover, plaintiff's contentions is based on the premise that the hearing examiner brought the charge against these claims, but the simple fact is that he did not. The Forest Service initiated

the charges, and this is made clear by the notice of hearing. Thus, Holt merely informed the plaintiff of the charges which were brought by the agency. Even if he had instituted the proceedings, this would not have violated the Administrative Procedure Act:

> "The APA says nothing about combination of instituting proceedings with judging. Under the Act, the same individual may 'accuse', in the sense of deciding that proceedings should be instituted, and may also judge." Davis, Administrative Law Text, p. 242.

Support is found in a law review survey of the law in this area. Note, "Disqualification of Administrative Officials for Bias," 13 Vand.L.Rev. 712, 722, n. 65 (1960).

[9] In Independent Quick Silver, plaintiff argues that by passing over the offer to prove that he was biased without commenting on it, Holt admitted that the charge was correct. Plaintiff has not cited any law which indicates silence can be construed as assent in such a situation. On the other hand, United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941), supports the opposite view.

In Converse, plaintiff argues that when Holt, in denying the offer of proof that he was biased, stated: "I don't deny the facts. I just deny the motion.", he admitted the truthfulness of the allegations contained in the affidavit. One must be a gymnast in semantics in order to arrive at this conclusion. The statement, when read in context, lends nothing to plaintiff's position.

Both motions for change of hearing examiner were denied on the ground that they were not timely and sufficient as required by 5 U.S.C. Sec. 1006(a).

There seems to be a substantial basis in the administrative record for this determination.

[10] Regarding the timeliness of the motion in Converse, even though Hearing Examiner Holt signed the notice of hearing, and even though the plaintiff had been in correspondence with Holt, in his official capacity, for some time prior to the hearing, plaintiff insists that the motion for change of hearing examiner could not have been made prior to the start of the hearing, because he did not even suspect Holt was to hear the case. The record anchors a finding that plaintiff knew for some time that Holt was to hear the case. Furthermore, to permit a mining claimant to delay hearings by waiting until the commencement of a hearing to ask for a change of hearing examiner, where as here it was necessary for the hearing examiner to travel several hundred miles to be present at a hearing, would frustrate the administrative process.

[11] In Independent Quick Silver, the motion for change of hearing examiner and supporting affidavit were not "sufficient", inasmuch as they show no real basis for concluding bias. Moreover, the motion does not seem to have been "timely" presented, at least under the circumstances of this case. The motion was not mailed to Holt, at his Sacramento office, until September 26, 1962, five days before the hearing started. Plaintiff states that this was the first date that it "chanced upon the information that Mr. Holt intended to preside." But plaintiff had written to Holt, in his official capacity, some five months prior to the hearing, asking for a postponement. It is the practice of the hearing examiner's office at the Bureau of Land Management to have the hearing examiner who signs the notice of

hearing preside at the hearing and write the decision. The attorney for Independent Quick Silver was experienced with this type of case and should have been aware of that practice. For that matter, it was he who represented plaintiff Converse at the other hearing in question here, which took place over three months prior to the filing of this motion.

Secretary's Authority and Jurisdiction

Both plaintiffs argue that Secretary Udall has denied them due process and "protection of the law" by failing to follow each jurisdictional requirement of the Surface Resources Act, 30 U.S.C. Sec. 613(a), the statute which gave him authority to determine title problems with reference to mining claims. In both briefs, plaintiffs set out many instances in which they assert the Secretary did not comply with the statutory requirements. They are listed and discussed below.

1. No head of a Federal Department requested the Department of the Interior to publish notice to mining claimant. The Chief of the Forest Service, in fact, requested the Department of the Interior to publish the notice to the mining claimants.

2. No such request was made which contained a description of the land by sections. This is without foundation, as the requests, in fact, contained such descriptions.

3. The request for publication was not accompanied by the required affidavit of an affiant who had, in fact, examined the lands. The requests, in fact, were accompanied by affidavits of affiants who had examined the lands.

4. No request for publication was accompanied by the required certificate of title or ab-

stract of title. Here the plaintiffs are technically correct, as the defendant could not comply with the literal wording of the statute due to the fact that there were no tract indexes of the lands in question maintained in the records of Linn and Crook Counties. Because of this fact, defendant instead submitted certificates of the nonexistence of the tract indexes. Obviously, compliance was impossible and the point does not go to the merits.

5 and 6. Plaintiffs allege that the Secretary did not publish notice as required, and that there is no proof of the publication. The affidavits of publication submitted by defendant show that the notices were published.

[12] 7. A copy of the publication was not served on the mining claimant as demanded by the statute. This was not done because the affidavits of examination did not show that plaintiffs were in possession of the claims, and, as pointed out above, no tract indexes were kept of these lands by the counties in which they were situated. However, a man who was found on the claims when the mining engineers examined them was served with a copy of the notice of publication, and the notices were published by the local newspapers in accordance with the regulations. Anyhow, plaintiffs were completely informed of the notice of publication, as they answered it by filing their verified statements. They are in no position to question the service.

[13] Both plaintiffs also argue that the procedure followed by the Bureau of Land Management in initiating contests must be followed in proceedings under the Surface Resources Act. There is no such requirement. The use of a complaint is averted by the publication requirements of that statute.

THE ALLEGED AMENDMENTS

[14] Both plaintiffs assert that due process was violated because the Secretary's decision was based on charges different than those laid, and that the hearing examiner switched the charges during the hearing. This allegation is also without foundation. The Notices of Hearing stated that the questions to be determined would be whether sufficient minerals had been found within the limits of the claims to constitute a discovery of a valuable mineral deposit, and whether the claims were sufficiently marked. This ground was not changed by the hearing examiner or by either of the two administrative appeals decisions which followed in both cases.

[15] Again, plaintiffs indulge in a play on words. They argue that the notice of hearing said only that the question as to whether mineral discovery had been made within the limits of the claims would be determined. Then they argue that this meant only that their case would be won if they could show a valuable mineral deposit within the boundaries of any of the claims, but that the hearing examiner changed the charges by requiring that a valuable mineral deposit be proven in each and every claim. Suffice to say, the Surface Resources Act requires that a mining claim be located on each and every claim, in order for them to escape the scope of the Act. The argument is frivolous.

[16] Plaintiffs make much of the fact that the hearing examiner admitted samples taken by the government after the effective date of the Surface Resources Act, while at the same time denying plaintiffs' motion to admit some samples taken after that date. The issue is not whether there

was a discovery at the date of the hearing, but whether a discovery was made upon the claims in question prior to the passage of the Surface Resources Act. To demonstrate a discovery prior to July 23, 1955, required samples of mineral from portions of the claims exposed prior to that date. Plaintiffs' evidence of mineral deposits exposed at a later date was not material. The government's samples were taken from areas which were exposed on or before the date of the Act.

EFFECT OF THE DECISIONS

The Ninth Circuit Court of Appeals has held that:

> "It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the adminstrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed." Henrikson v. Udall, 350 F.2d 949, 950 (9th Cir. 1965); Adams v. United States, 318 F.2d 861 (9th Cir. 1963).

[17] Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision. A discussion of some of plaintiffs' arguments which attack the merits of these decisions follows.

BURDEN OF PROOF

[18] When the government contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case.

The burden then shifts to the claimant to show, by a preponderance of the evidence, that his claim is valid. Foster v. Seaton, 106 U.S.App.D.C. 253, 271 F.2d 836 (1959). 68 I.D. 235, 238 (1961).

[19] From an examination of the entire record, I find that the government did sustain its burden of proof. Manifestly, the testimony of the government witnesses was sufficient to create a prima facie case in favor of the government's position. Their examination of the claims and their analysis of the mineral samples taken therefrom failed to disclose a discovery of a valuable mineral deposit on any one or more of the claims.

[20] It is now settled beyond question that the issue of whether there has been a valid discovery of minerals is a question of fact. Furthermore, it is indicated that the decision of the Secretary on that issue is conclusive, in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659 (1920). Whether the decisions of the Secretary of the Interior in this case are conclusive, I need not decide. Certainly, there is no evidence of fraudulent, capricious or arbitrary action on the part of the Interior Department, unless it could be said that the action of the hearing examiner in failing to step aside could be viewed in that light. Already, I have decided adversely to the plaintiffs on this issue. Again, I repeat that the finding that a discovery of a valuable mineral deposit was not made on any one or more of the claims prior to July 23, 1955, is supported by substantial evidence and must not be disturbed.

To be kept in mind is the fact that most of the higher quality samples of minerals, on which plaintiffs rely, were taken from cuts exposed after the effective date of the Act.

BONANZA CLAIM

One more problem which is worthy of discussion is the finding of the hearing examiner in Independent Quick Silver that the Bonanza Claim was valid. The record quite conclusively shows that the boundary markings on the ground did not measure up to required standards. This fact was recognized by the examiner, but apparently overlooked when preparing his finding on the validity of the claim. Moreover, he assumed that certain improvements were within the boundaries of the claim, despite the fact that no substantial evidence was placed in the record in any way showing that fact.

As pointed out by the record on administrative appeal, the testimony of a Mr. Hogg, on which the hearing examiner relied, was grounded on hearsay. The witness based his testimony, not on his own knowledge, but on information supplied to him by a Mr. Champion, now deceased. The alleged summarization of Champion's panning estimates were not understood by the witness, nor could he make an explanation thereof. Even if I assume that Champion's panning estimates were business records, and thus admissible in evidence, those estimates, on their face, are not sufficient to establish the claim. In any event, there is no substantial evidence that the samples were produced from the earth within the boundaries of the Bonanza Claim, even if legal boundaries in fact existed. I find myself in full agreement with the summarization by the Secretary in his decision.[7]

---

7. "* * * Although some ore was encountered, the writers of the reports apparently did not consider their findings adequate to support extended mining operations but in each report

Although other contentions are made by the respective plaintiffs, I feel they are so intertwined with the subjects here discussed that fur-

---

7.(continued) recommended further exploration. As discussed before, one ore body was defined by Hogg, but there was no evidence other than mention of that by Westman, apparently based on his reading of Hogg's report, otherwise verifying that it constituted a mineral deposit which might have value. The evidence does not show that there was any development work done on the ore body. This seems rather strange 23 years after its supposed delineation. The Forest Service mining examiners could not find an ore body exposed which had any cinnabar ore of value.

To conclude, the evidence submitted by the claimant was more quantitative than qualitative. There was a lack of specificity which would relate the information to a particular claim or claims. Much of the evidence was general in nature and much of it, especially specific information, was heresay where there was no opportunity for cross examination and proper delineation of the purported facts shown. In some instances there was no foundation for some of the information. At the most, even as to the purported ore body on the Bonanza claim, it is apparent that further developmental and exploratory work was recommended. Appellant did not present evidence which would show that any ore bodies supposedly found prior to 1955 constituted valuable mineral deposits as of July 23, 1955, by establishing that a prudent man could expect that the value of the ore would exceed costs in developing the mine and hence could expect that a profitable mine might be developed. This is the test for establishing a discovery in this case. * * *"

ther analysis is not required. It is sufficient to say that I find no substance in such contentions. Overall, the determination of the Secretary in each case must be affirmed.

Of course, this affirmance in no way affects the validity of the mining claims as such. Plaintiffs retain the right to work their claims for mining purposes, and for all purposes incidental to mining. This affirmance only precludes the plaintiffs from using the surface resources of the claims in a manner which is not incidental to mining, until a patent is obtained. In other words, the claims remain subject to the right of the government to manage the surface resources, when not interfering with the mining.

The decision of the Secretary in each case must be affirmed.

ORDER
On motion for new trial

This cause is before the Court on plaintiffs' motion for a new trial on the Court's previous decision of September 14, 1966.

Independent Quick Silver again challenges the Government's method of sampling each of the twenty-two claims involved, it being claimed that there was a failure to prove a prima facie case by substantial evidence. It is urged that the six samples of ore taken by the contestant all came from one of the twenty-two claims in controversy, viz: the Lost Mine Claim.

[21] The evidence is contrary to the plaintiff's contentions. The Forest Service Examiners spent three days examining the claim

and, in fact, examined all of the places shown to them by the plaintiff's representatives and took samples of all of the cuts that were open. Plaintiff is not in a position to now urge that all of the samples came from one claim when it was its own representatives who directed the Forest Service Examiners to where to obtain the samples. If, as here, a close scrutiny of the surface indicated that no cuts had been opened other than examined, then it seems rather clear that a mineral discovery had not been made.

Plaintiff again urges that the Assistant Solicitor of the Interior committed error in holding that certain testimony and reports were hearsay. The Solicitor stated, in passing, that much of the evidence was general in nature and that much of it probably, especially specific information, was hearsay where there was no opportunity for cross-examination. Although the Solicitor might have disregarded some of the Hogg statements and the assays compiled by the geologist Westman, the fact remains that the Assistant Solicitor accepted all of this testimony and these records, but found that the evidence lacked specificity and showed only that further exploration was recommended. Plaintiff's real complaint is that the Solicitor did not give more weight to this evidence, rather than excluding it under the hearsay rule.

It is next urged that if the decision of September 14th is allowed to stand that the Court would be approving an administrative decision that the discovery of a body of ore containing 18,600 tons, with an average of 5.2 pounds of mercury per ton, would not be a discovery within the meaning of the mining law. There is nothing in the decision of the Assistant Solicitor, nor, for that matter, in any part of the record, which supports

this argument. The Solicitor merely held that the plaintiff did not sufficiently prove that such a body of ore existed. In other words, the Solicitor resolved the issue of fact against the plaintiff.

I find nothing in the arguments of Quick Silver which would cause me to, in any way, modify my original opinion.

In the Converse case, it is argued that the original decision departs from the well settled rule of discovery and makes discovery depend on the name applied to the additional work which a reasonably prudent person would be justified in expending in both money and effort. It is argued that the Assistant Solicitor has altered the long-standing policy of the Department and now recognizes a distinction between the terms "discovery", "development", and "exploration". The record leaves little doubt that the Department has long recognized a sharp distinction between "exploration" and "development" in connection with whether a "discovery" has been made. For example, if one has found enough mineral to justify a "development", then a "discovery" has been made. The opinion of the Assistant Solicitor is given complete support by United States v. Altman et al., 68 I.D. 235, 237-8 (1961), from which I quote:

> "There is, of course, a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are found of low value,

> there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made."

Additional support is added to the opinion of the Assistant Solicitor by United States v. Edgecumbe Exploration Co., Inc., A-29908 (May 25, 1964).

Plaintiff fails to recognize that once the Government has established a prima facie case, the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 106 U.S.App.D.C. 253, 271 F.2d 836 (1959).

The motion for a new trial in each case is denied.

It is so ordered.

APPENDIX C

DECISION BELOW

No. A-30177--March 26, 1965

UNITED STATES
v.
FORD M. CONVERSE

A-30177 Decided March 26, 1965

Administrative Procedure Act: Hearing Examiners--
Rules of Practice: Hearings

A hearing officer is not disqualified nor will his findings be set aside in a mining contest upon a charge of prejudice and prejudgment of the case in the absence of a showing of bias.

Mining Claims: Determination of Validity

The Department of the Interior has been granted plenary power in the administration of the public lands, and, until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has power, after proper notice and upon adequate hearing, to determine the validity of the claim.

Mining Claims: Discovery

To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable deposit.

Mining Claims: Discovery--Surface Resources Act:
Generally

A Government mineral examiner investigating a mining claim prior to a proceeding under the act of July 23, 1955, has no duty to test a claim for discovery beyond examining the discovery points made available by the mining claimant.

Mining Claims: Special Acts--Mining Claims: Surface Uses--Surface Resources Act: Generally

In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mineral claimant to the surface resources of his mining claim, the claim is properly subjected to the terms and limitations of section 4 of that act unless it is shown that there was a valid discovery within the meaning of the mining laws made within the limits of the claim prior to the date of the act.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-30177

: Oregon 011195-D

United States
v. : Mining claims declared
Ford M. Converse : subject to the act of
: July 23, 1955

: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ford M. Converse has appealed to the Secretary of the Interior from a decision dated October 8, 1963, whereby the Assistant Director, Bureau of Land Management, affirmed a decision of a hearing examiner declaring the Paymaster No. 1 and Edith lode mining claims in sections 1 and 2, T. 12S., R. 4 E., W.M., Willamette National Forest, Oregon, subject to the limitations and restrictions of section 4 of the act of July 23, 1955, 69 Stat. 368, 30 U.S.C. Sec. 612 (1958).

A hearing was held at Portland, Oregon, on June 11, 1962, to determine the surface rights on the claims in a proceeding initiated by the Forest Service, U. S. Department of Agriculture, pursuant to section 5 of the act of July 23, 1955, 69 Stat. 369, as amended, 30 U.S.C. Sec. 613 (Supp. V, 1964). The sole issue at the hearing was whether or not a valuable deposit of minerals had been discovered on either of the claims prior to July 23, 1955. The hearing examiner did not attempt to determine whether or not a discovery had been made since that date, although much of the testimony produced at the hearing pertained to evidence of mineralization uncovered since that date.

At the outset of the hearing the mining claimant filed a motion to change the hearing examiner and filed an affidavit in support of that motion charging the hearing examiner with bias and prejudice. The motion was denied as not having been timely filed.

The record shows that the claims were owned in 1910 by the appellant's father. At that time a tunnel 130 feet long was excavated along a vein in the Paymaster claim and minerals were removed from an extensive stope. The claims were subsequently abandoned and were relocated by the appellant in 1951. In 1959 and 1960 the Forest Service constructed an access road to the area across the Edith claim. Prior to that time access to the claims was by a mountain trail, and in 1951 the closest road was 30 miles from the claims.

In the process of constructing the road across the Edith claim a number of cuts were made which exposed mineralization. Most of the appellant's evidence of mineral value and much of the testimony of his witnesses were based on minerals exposed in

the road cuts and other workings and improvements constructed after 1955. Much of this evidence was excluded from the hearing over the objection of the appellant. A substantial portion of the admitted testimony was also related to minerals exposed after 1955 and could be related only indirectly to the question of discovery prior to 1955. This testimony was admitted over the objection of the contestant.

From the evidence adduced at the hearing, the hearing examiner found that minerals have been known to be in the area of the claims for half a century. He found that mineral samples showing substantial quality had been found but that the problem was to determine whether there was a sufficient concentration of minerals to justify the cost of development and that there was no evidence at the hearing that this determination had been made. He concluded that the most favorable finding which could be made for the mining claimant was that in 1955 there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed, but that there was not sufficient evidence of mineralization as of July 23, 1955, to induce a prudent man to expend labor and means on either claim with a reasonable expectation of developing a valuable mine.

In his appeal to the Secretary, the appellant has reiterated essentially the same arguments that were contained in his appeal to the Director of the Bureau of Land Management. In substance, he contends that: (1) a fair hearing was impossible because the hearing examiner, by his own admission, was prejudiced agains the claimant and had prejudged the case; (2) the claimant is entitled to a jury trial, and an administrative hearing is a depriva-

tion of property without due process of law; (3) the contestant failed to establish a prima facie case and affirmatively showed that a discovery had been made on each of the claims; (4) the Director erred in holding that assays of ore samples taken by the mining claimant after July 23, 1955, were inadmissible while those taken by the contestant after the same date were admissible; (5) the Director erred in holding that "exploration" and "development", as used in mining law, are not synonomous; (6) the Government's witnesses did not fairly sample portions of the claims alleged to have been opened prior to 1955; (7) the Director either ignored or refused to accept the facts found by the hearing examiner.

The appellant's charge of admitted prejudice on the part of the hearing examiner is based upon an affidavit which the appellant filed at the commencement of the hearing in which he stated that he was a mining claimant and the hearing examiner in this case was the hearing examiner in the case of the United States v. Santiam Copper Mines, Inc. A-28272 (June 27, 1960). He then stated:

> "That based upon the decision in that case and upon the conduct of the Examiner in that case, and upon my own independent investigation, I have concluded that said Hearing Examiner cannot try the above entitled case in an impartial manner, that he has pre-judged my case and is unable to grasp any evidence which does not harmonize with his preconceived opinion of the matter. That for me to have a hearing before said examiner is a vain and useless gesture. That I am informed and believe that no mining claimant has ever prevailed in the State of Oregon in a contest of this kind heard by * * * [the hearing examiner]. That

> I am convinced that if said examiner is permitted to hear my case, that he will ignore the facts, refuse to make findings in accordance with the evidence, and will decide the case against me to please his superiors; That he will exercise no independent judgment of his own but will subordinate the merits to politically dictated policy."

Upon the filing of the appellant's motion for a change of hearing examiners and the denial of the motion, the following dialogue took place between the hearing examiner and the appellant's attorney:

> "MR. MURRAY: Do I understand that the Hearing Examiner refuses to testify as a witness in support of the facts averred in the affidavit here?
>
> HEARING EXAMINER HOLT: That's correct.
>
> MR. MURRAY: And does the Hearing Examiner deny the offer of proof that we propose to prove by the testimony of the Hearing Examiner as to the facts averred in the affidavit?
>
> HEARING EXAMINER HOLT: I don't deny the facts. I just deny the motion. You may make an offer of proof, if you care to." Tr. 4.

The hearing examiner's statement cannot reasonably be construed, as the appellant has attempted to do, as an admission of the truthfulness of all of the appellant's allegations. The hearing examiner admitted the first and only factual statement of the affidavit, that he and the appellant were participants in the Santiam Copper Mines case. This is

hardly a showing of bias. The remainder of the allegations of the affidavit are merely conclusions and opinions of the mining claimant. By no stretch of the imagination could they be considered to be facts which were admitted by the examiner. In denying the appellant's motion, the hearing examiner, in effect, denied the truthfulness of those allegations.

As stated in the Assistant Director's decision, it requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. United States ex rel. DeLuca v. O'Rourke, 213 F.2d 759, 763 (8th Cir. 1954). The unsubstantiated allegations of the appellant fall far short of the substantial showing required to disqualify a hearing officer.

The authority of this Department to determine the validity of a mining claim in an administrative proceeding is well established and needs little comment. The Department has been granted plenary power in the administration of the public lands. Until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has power, after proper notice and upon adequate hearing, to determine the validity of a mining claim. Due process in such a case implies notice and a hearing, but it does not require that the hearing be in the courts, or forbid an inquiry and determination by this Department. Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Davis v. Nelson, 329 F.2d 840 (9th Cir. 1964). Thus, the appellant's charge that he has been deprived of property without due process of law is entirely without merit.

The remainder of the appellant's major contentions pertain to the test relied on by the hearing examiner in determining whether a discovery had been made and to the admission and exclusion of evidence and the conclusions drawn from the evidence admitted.

In support of his charge that the Director either ignored or refused to accept the factual findings of the hearing examiner the appellant alleges that:

> "The assay of samples from the mineral-bearing lode structure on the Edith Claim of contestant's sample was $31.10 per ton; the average of 22 of mining claimant's samples was $56.64 per ton; a total average of 26 samples, both contestant's and mining claimant's of $52.63. The assay averages of samples taken on the Paymaster Claim of the mineral bearing lode structure was $29.57 per ton for contestant's sample, and $122.25 per ton for 4 of mining claimant's samples, an average for the 5 samples of $103.72 per ton. When one considers that the assay averages of the value of all ore mined in the United States for gold and silver is $9.80 per ton, for lead and zinc, $12.00 per ton, for copper, $4.80 per ton, the mining claimant's certainly established a discovery of valuable minerals within the meaning of the mining law."

The fallacy of the appellant's argument, however, lies in his failure to recognize the applicability of other criteria for determining whether there has been a discovery besides the unelucidated values of mineral samples.

The issue in this case is not whether there has been a discovery but whether a discovery was made upon either of the claims in question prior to July 23, 1955. As has been noted, the hearing examiner did not purport to determine whether or not a valuable deposit of minerals had been discovered at all but only whether such a deposit was discovered prior to July 23, 1955, for, if a discovery was not made prior to that date, the mining claimant has no right to use the land for other than mining purposes prior to the issuance of a patent. See United States v. Carlile, 67 I.D. 417, 421 (1960); United States v. Clarence E. Payne, 68 I.D. 250, 253 (1961). It was therefore necessary, in order to establish the fact of a discovery prior to July 23, 1955, to demonstrate such discovery on the basis of showings of mineral value from portions of the claims exposed prior to that date. It was for this reason that the hearing examiner rejected most of the appellant's evidence based upon mineral showings exposed at a subsequent time.

Contrary to the allegation of the appellant, the hearing examiner did not apply one rule of evidence to the contestant and a different rule to the mining claimant in admitting into evidence assys of samples of ore taken by the contestant after July 23, 1955. It was the date of exposure of the source of the ore sample and not the date of the taking of the sample that determined whether or not a sample was proper evidence. 1/

1/ It is noted that in his present computation of demonstrated mineral values the appellant has lumped together the aggregate of samples taken from the claims without regard to whether they were taken from discovery points uncovered prior to 1955 or from those more recently exposed.

With respect to the evidence itself, as to the Edith claim, the record shows that contestant's witness Suchy took samples from the discovery cut which was opened before 1955 and that the results of those samples disclosed little or no value (Tr. 44-45). Another sample from boulders along the creek indicated value of $5.90 per ton, but there was no way of determining where the boulders came from (Tr. 46-47). Suchy concluded that a prudent man would not be justified in expending further time or means on the structures at the north end of the claim (Tr. 51), although, on cross-examination, he did advise the appellant to spend more money on exploration of the recently exposed structures at the southern end of the claim for the purpose of determining the continuity and persistency of veins in those structures (Tr. 101).

Nearly all of the testimony and evidence on behalf of the appellant relating to the Edith claim pertained to areas of the claim that have been exposed since 1955, and, while some of the ore samples taken were found to contain significant quantities of minerals, the testimony of the appellant's witnesses is not substantially at variance with that of the contestant's witness.

Appellant's witness Leonard was asked by appellant's counsel:

> "Now, Mr. Leonard, from your experience as a prospector and mining man, a miner, and based upon your experience and studies of economic geology, could you give us your opinion as to whether or not there is a sufficient mineral showing on the Edith or the Paymaster Claim to warrant a reasonably prudent man in spending time and money to develop a paying mine?"

To which he replied:

"Yes, I would say that I would recommend it, and I would even go so far as to say that there are some places in there that look very encouraging. Whether they would turn out as encouraging as they look, I don't know. The record of the area in recent years has been poor. At one time, they did have a little success, but it's very difficult to guess what your result would be. I think it's worth some expenditure, however, I have always thought that. The area has been very poorly developed, but you're very fortunate to find ores on the surface, and some little development work might turn up much better ore here than we locally presume." (Tr. 171-172).

On cross-examination, Leonard was asked by the contestant's counsel:

"When you're talking about spending additional money, as I understand your use of the words, you believe that more prospecting should be done here because there's some encouraging showings, is that what you say?"

He replied:

"Yes, I think it's true of practically any mining district. If a mine has got, of course, lots of high grade ore showing, somebody is certainly going to be shipping it, and very many mines are worthwhile--that is, they have the environment to make ore, but no one has gone say two or three hundred feet deep on them or something to give them a chance to see whether they're a real big mine, or whether

they're a fizzle, and the point of spending money arrives before you know that." (Tr. 172-173).

Testimony of other witnesses for the appellant was to a similar effect.

With respect to the Paymaster No. 1 claim, contestant's witness Holmgren testified that he had taken two ore samples from the claim, the first of which showed no mineral value, and the second of which indicated a value of $29.57 per ton. When asked if he had an opinion as to whether or not a reasonably prudent man would spend further time and means with a reasonable prospect of developing a paying mine on the claim, he replied:

"Well, there's certainly nothing to be seen in the face, and the little remnant of ore that remained there at the end of the old stope was not conducive to spending any money on it in an effort to open the tunnel. The structure in the tunnel was extremely narrow and the stope was extremely narrow, and it probably had all been done by hand work at the time." (Tr. 109).

On cross-examination, the following exchange took place between the appellant's counsel and Holmgren:

"Q. Well, do you think this $29.57 would justify a reasonably prudent person in spending some more money to see if there is some ore, more of that same grade of ore in that stope?

A. Well, I seriously doubt that there's any more in that stope. I think it was all taken out at the time it was stoped.

* * * * * * * * * * * * *

Q. And you don't think it would be worthwhile, or that a person would be justified in trying to find some more of that twenty-nine dollar rock in there?

A. From the indications here, there is very little alteration on the wall rock. It seems to be extremely tight. There's very little alteration, and I don't think it warrants any further work.

Q. It's not worth exploring, in your estimation?

A. I wouldn't think so.

Q. Or spending any money on exploration?

A. I wouldn't think so." (Tr. 113-114).

Appellant's witness McInnis testified that he took two samples of ore at a point approximately 10 feet inside the tunnel on the Paymaster claim which indicated values of $112.64 and $122.68, respectively, per ton. (Tr. 124-125). However, across the face of the assay report for the samples is written "These Samples Taken East of culvert in main vein of Edith." (Contestee's Ex. 3). The confusion is compounded by the fact that the contestee's exhibit 28, a diagram of the Edith claim, indicates that two samples, number "3" and coinciding in mineral content with those reportedly taken from the Paymaster, were taken from the newly-exposed area of the Edith claim, whereas contestee's exhibit 27, a diagram of the Paymaster claim, does not show any such samples. Thus, the probative value of those samples is nullified by the ambiguous evidence as to their place of origin.

Appellant's witness Persons testified that he had taken a sample from the Paymaster across 12 inches of vein material which assayed $71.51. (Tr. 140-141). There is nothing, however, in his testimony or in that of the other witness for the appellant that establishes the continuity or the quantity of such ore. There is no evidence in the record that any further values were found in the Paymaster than were known to exist at the time the claims were abandoned after their initial location. The testimony of witnesses for both parties is wholly consistent with the factual findings of the hearing examiner.

The primary dispute in this case, however, is not over the facts but over the legal significance to be given to the established facts. The appellant has consistently maintained that the term "development" may be equated with "exploration", and it is quite clear that it was in the latter sense that the former was used by the appellant's witnesses at the hearing.

The standard for determining whether or not there has been a discovery of a valuable mineral deposit, as set forth in Castle v. Womble, 19 L.D. 455 (1894), and adhered to in innumerable decisions since that time is that:

> "* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met." 19 L.D. at 457.

The Department, however, recognizes a distinct difference between exploration and discovery under

the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Clyde R. Altman and Charles M. Russell, 68 I.D. 235 (1961); United States v. Edgecumbe Exploration Company, Inc., A-29908 (May 25, 1964), and cases cited therein.

The distinction recognized by the Department is not inconsistent with the case of Charlton v. Kelly, 156 Fed. 433 (9th Cir. 1907), cited by the appellant as authority for the proposition that "exploration" and "development" mean the same thing. In that case, a contest between two mining claimants, the trial court instructed the jury that the mineral discovered must, in order to constitute a discovery, be of such quantity and character and found under such circumstances as to justify a man of ordinary prudence in the expenditure of his time and money in the development of the property. The Court of Appeals stated that:

> "It is argued that a discovery sufficient to justify the expenditure of time and money in the development of a mining claim must necessarily be greater than that which is necessary to justify the expenditure of money for the purpose of exploration, with the reasonable

expectation that, when developed, the claim will be found valuable as a placer mining claim. Counsel for the plaintiffs in error have assumed for the word 'development' a broader meaning than was intended in the charge. The court did not mean that, in order to comply with the law, there must be such a discovery as to justify the expenditure of time and money upon a claim to the extent of opening up the whole thereof and acquiring an exhaustive knowledge concerning its resources. The word as it was used by the court, and as in connection with the whole charge it must have been understood by the jury, was equivalent to the word 'exploration', and was used in the sense in which it was employed in Chrisman v. Miller, 197 U.S. 313, 323 * * * in which the court thus quoted with approval the language of Mr. Justice Field in a prior case:

'The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantites as to justify the expenditure of money for the development of the mine and the extraction of the mineral.'" 156 Fed. at 436; emphasis added.

In that case and in Chrisman v. Miller, 197 U.S. 313 (1905), the courts recognized a difference in the standard to be applied in a contest between two mining claimants, where the principal issue is which of the claimants made a discovery first, and a contest by the Government, in which case the question is whether there has been a discovery which would justify disposition of the land from the public domain under the mining laws.

> "It is true that when the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. * * * But even in such a case * * * there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining." 197 U.S. at 323.

If a greater showing of mineral value is required to take lands from the category of agricultural lands than is required in a contest between two mining claimants, a fortiori, a greater showing is also required to take lands from the jurisdiction of the United States. The test applied by the hearing examiner in this case is the one which the Department has consistently followed in contests between the Government and mining claimants in determining whether or not there has been a discovery of a valuable mineral.

I find the testimony of the two witnesses for the Forest Service adequate to establish a prima facie showing that there was not a discovery on either claim prior to July 23, 1955. 2/ Suchy's

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2/ The burden is then upon the claimant to establish by a preponderance of the evidence that a discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

opinion, elicited on cross-examination 3/ contrary to the assertion of the appellant, does not establish the fact of a valid discovery. At the most, it is a recommendation that further exploration be conducted on the claim, and from its context in the hearing, it is clear that this recommendation is based principally upon recently exposed mineral findings and not those exposed prior to 1955.

The testimony given in behalf of the mining claimant indicated that mineral samples of significant value have been taken from the claims. However, that testimony does not substantiate a finding that on July 23, 1955, a sufficient body of ore had been exposed to meet the requirements of the prudent man test. Indeed, the appellant's arguments do not suggest that he is convinced that he had satisfied the Department's requirements for showing a discovery prior to that date. His arguments are largely in the form of an attack on the test that was applied, a test that the Department has held to be proper.

3/ After extensive cross-examination by the appellant's attorney, which included discussion of ore located in parts of the Edith claim exposed after 1955, witness Suchy was asked by the appellant's counsel if a reasonably prudent person would be justified in spending further time and money in developing the Edith Claim. Such replied that:

> "I think he's at the stage where he is justified in doing some exploration to try to determine the continuity of the structures he has exposed, and seeing what persistence there is to the veins or the structures that are present on the claims." Tr. 80, 81.

The appellant has charged the contestant's witnesses with failure to sample fairly that portion of the Edith claim which was opened prior to 1955. The record shows that those witnesses were accompanied on each of their examinations of the claims by the mining claimant or by one or more of his employees. At those times it was possible for the claimant to point out specific areas from which mineral samples should be taken. The record does not indicate that the contestant's witnesses refused to take samples from any point suggested by the claimant or that any specific areas in the old workings were pointed out as being favorable for ore samples. Neither did the appellant submit assay reports on the pre-1955 workings that were adequate to rebut the findings of the contestant's experts. It is the duty of a mining claimant whose claim is being contested to keep discovery points available for inspection by the Government mining examiners, and those examiners have no duty to rehabilitate discovery points or to make a discovery for the claimant. United States v. Hunt, A-28189 (February 29, 1960); United States v. Spar Mining Company et al., A-28786 (July 30, 1962).

The remainder of the appellant's contentions have been carefully reviewed, and I do not find any error in the conclusions of the hearing examiner or the Assistant Director. The claims were, therefore, properly held to be subject to the restrictions of the act of July 23, 1955.

If the appellant is convinced that he has satisfied the requirements of a discovery, he may, of course, apply for a patent to the claims. If, on the other hand, he does not wish to risk the possibility of an adverse ruling on that question, this decision does not bar further effort on his part to explore and develop the mineral deposits

which may be found within the limits of the claims and then, upon making a discovery, apply for a patent. As long as the land remains open to the operation of the mining laws, the claimant is protected in his right to such deposits, but until a patent is issued, his use of the land embraced by the claims is limited to mining and other uses of the land incidental to mining.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appeal from is affirmed.

S/ Ernest F. Hom

Ernest F. Hom
Assistant Solicitor
Land Appeals

APPENDIX D

DECISION BELOW

No. Oregon 011195-D--October 8, 1963

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D.C.

DECISION

United States	: Involving the Paymaster 1/
	: and Edith lode mining claims.
v.	: Situated in Secs. 1 and 2, T.
	: 12 S., R. 4 E., W.M., Linn
Ford M. Converse	: County, Oregon, a part of the
	: Willamette National Forest

Decision Affirmed

Ford M. Converse has appealed from a Hearing Examiner's decision, dated January 29, 1963, holding that the above-identified claims are subject to the limitations and restrictions specified in Section 4 of the Act of July 23, 1955 (P.L. 167). (69 Stat. 367; 30 U.S.C. 611-615).

At the recommendation of the Forest Service, U. S. Department of Agriculture, proceedings were initiated by the United States under the provisions of the Act of July 23, 1955, supra, to determine the rights of the mining claimant to the use of the surface resources on the two mining claims before obtaining from the United States patents to the claims. Rights to the surface resources were asserted by the mining claimant in a verified statement filed July 26, 1961. In accordance with the terms of the Act, 30 U.S.C.A. 613(c); 43 CFR 185.131, the Hearing Examiner notified the mining claimant of a hearing to be held on June 11, 1962, to determine the validity of the rights asserted.

The issue involved in the instant proceedings was very thoroughly discussed at the outset of the Hearing Examiner's decision. In substance, the Hearing Examiner pointed out that under the general mining laws of 1872, the exclusive right of possession and enjoyment of the surface of an unpatented mining claim was in the mining claimant, but that the Act of July 23, 1955, supra, amended these laws by providing that mining claims shall not be used, prior to the issuance of patent to the claimant, for any purposes other than prospect-

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1/(page A62) During the course of the hearing, this claim was more specifically identified as the Paymaster 1 lode mining claim.

ing, mining or processing operations and uses reasonably incident to mining, and that mining claims located after the date of the Act "shall be subject, prior to the issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof." The Hearing Examiner stated that claims located prior to the Act, such as the ones in issue, must be validated by discovery before July 23, 1955, in order to be free of the restrictions and limitations of the Act, and that the issue to be determined in the instant case is, therefore, whether there was a discovery on either of the claims prior to July 23, 1955. The Hearing Examiner observed that regardless of the outcome of the proceeding, the mining claimant will have the right to use the claims for mining purposes and uses incident thereto, and that the proceedings will affect only the surface resources, including timber valued at $91,038.61.

The mining claimant asserts that the Hearing Examiner erred in not granting his "Motion for Change of Hearing Examiner", filed at the commencement of the hearing, arguing that the Hearing Examiner's statement "I don't deny the facts, I just deny the motion," is an admission of the charge in the motion that he had prejudged the case. The mining claimant argues that he was denied due process of law because he was forced to try his case before an admittedly prejudiced Examiner, where the Examiner took upon himself the functions of both making the charge and then pronouncing judgment on his own charge, and that it is an attempt to take his property without just compensation. Further along this line, the claimant argues that he was deprived of the jury trial guaranteed him by the Seventh Amendment of the Constitution.

Without ruling on the timeliness of the mining claimant's Motion for Change of Hearing Examiner, it is our opinion that the motion was properly denied. It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that the hearing was unfair. United States ex rel DeLuca v. O'Rourke, 213 F.2d 759 (1954). In the instant proceedings, the charge that the Hearing Examiner had prejudged the case against the mining claimant, based on the conduct of the Examiner in a previous case to which the claimant was a party and on the assertion that he had never before ruled in favor of a mining claimant in proceedings of this kind in the State of Oregon, is unsupported by any evidence of the accuracy of the charge, much less a showing that, if correct, the Examiner would be, for those reasons, unable to render an impartial decision in this instance.

It is true, as the appellant states, that a hearing before an admittedly prejudiced tribunal is a denial of due process. In the instant case, however, the Examiner was not admittedly prejudiced. The Examiner's refusal to deny the facts after denying the motion was not an admission of the charge of prejudgment. Having denied the motion there was no reason for the Examiner either to admit or deny the facts asserted therein.

Regarding the claimant's assertion that the Examiner both made the charge and then pronounced judgment on it, it should be noted that the Notice of Hearing, issued by the Examiner on April 23, 1962, clearly states that the proceedings were initiated by the Bureau of Land Management, at the request of the Forest Service. The Examiner stated that the Forest Service asserted, and wished to offer evidence to prove, that no discovery had been made

on the claims. Thus, the Examiner merely notified the claimant of the charge recommended by the Forest Service as provided in the regulation 43 CFR 185.131. He was not the initiating party.

The claimant's contention that he has been denied the jury trial guaranteed by the Seventh Amendment is likewise without merit. The Seventh Amendment requires jury trials "in Suits at common law, where the value in controversy shall exceed twenty dollars." Proceedings before administrative agencies are not, however, suits at common law. Guthrie National Bank v. Guthrie, 173 U.S. 528, 537 (1899); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1947).

The mining claimant asserts that the refusal of the Hearing Examiner to allow him to make offers of proof in order to make a record for appeal is tantamount to a denial of a hearing and is a denial of due process of law because it prevents any appellate authority from considering the admissibility of the excluded evidence when reviewing the record. An examination of the record discloses, however, that the Examiner did not deny the claimant the right to make an offer of proof, but that the offers of proof were denied in the manner offered. (Tr. 25, 58, 67, 149, 150). The rules of practice 43 CFR 221.74(b), state that offers of proof must be in writing. Hence, the Examiner's refusal to permit witnesses to answer over objection was not erroneous.

It is next asserted by the claimant that the Hearing Examiner erred in failing to grant his motion for dismissal of the proceedings on the ground that the United States had failed to establish a prima facie case in support of its charge, but that its evidence affirmatively shows that a discovery has been made on each of the claims in question.

He asserts that he has shown by a preponderance of the evidence, on the other hand, that a mineral bearing vein, lode or ledge of rock in place was discovered on the claims in 1951, and that he has since confirmed his discovery by subsequent sample and by the opinions of experts.

In connection with the issue of discovery, the claimant argues that it was improper for the Hearing Examiner to rule, during the course of the hearing, that the matter at issue was whether or not there was a discovery on the claims as of July 23, 1955, because the Examiner's Notice of April 23, 1962, stated that the charge was that there had not been a discovery of mineral on the claims at any time. He contends, that, in view of this charge, evidence of discovery at any time would be admissable, so there should have been no restriction of the evidence to discoveries before July 23, 1955.

By filing his verified statement alleging rights in the vegetative and other surface resources of the Paymaster and Edith claims, the mining claimant thereby asserted the validity of his claims on July 23, 1955, as the basis of his claim to the protection afforded by the Act of July 23, 1955. The issue thus raised was whether the claims were validated by a discovery on each of them before the date of the Act. Accordingly, the Hearing Examiner properly directed the testimony taken at the hearing toward the resolution of this issue, Cf. United States v. Iron Clad Mining Company, A-28655 (September 14, 1961). For this reason, evidence relating to minerals encountered after July 23, 1955, was properly excluded as immaterial. On the other hand, evidence relative to minerals encountered before July 23, 1955 was material to the issue to be resolved. Thus, assay reports and opinion testimony involving minerals encountered before July 23,

1955, was properly admitted even though the assay samples were taken at a later date.

We have concluded, after carefully reviewing the hearing transcript and exhibits and the briefs submitted by both parties, that the Hearing Examiner properly held the Paymaster 1 and Edith mining claims to be subject to the restrictions and limitations of the Act of July 23, 1955. The testimony of the Government's witnesses regarding the work that had been done on the claims by July 23, 1955, is sufficient to establish a prima facie case in support of a charge of lack of discovery on the claims before that date. Assay reports of samples taken from the places identified by the claimant, his associates or employees as being pre-1955 workings, coupled with the testimony regarding the examinations of the claims, clearly justifies a finding that a reasonably prudent man would not have been justified, on the basis of the evidence of mineral available to him in July 1955, in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine on either or both of the claims. The mining claimant's evidence is not sufficient to overcome this prima facie showing. The claimant's case consists largely of opinion evidence and mineral samples which, although supported by assay reports, are for the most part only generally located as to origin and unsupported by any evidence as to the manner in which they were taken, their size or width.

The mining claimant vigorously argues that the concept of discovery applied by the Department of the Interior in recent cases and by the Hearing Examiner in the instant case, does not truly reflect the intent of the mining laws and the holdings of early decisions rendered both by the Department and by the

Courts. He contends that the landmark decision of Castle v. Womble, 19 L.D. 455 (1894), 2/ as interpreted and approved in Charlton et al. v. Kelly, 156 F. 433 436 (1907), and Chrisman v. Miller, 197 U.S. 313 (1905), stands for the proposition that a discovery has been made when a reasonably prudent man encounters evidence of minerals which would induce him to make further exploration of the claim; that insofar as the law regarding discovery is concerned "development" and "exploration" are synonymous. The Department has, however, consistently ruled against this argument. United States v. Santium Copper Mines, Inc., A-28272 (June 27, 1960); United States v. Clyde Ramond Altman and Charles M. Russell, A-28278 (July 17, 1961); United States v. Jessie Shackleford et al., A-28788 (August 15, 1962).

In the Altman and Russell decision, supra, the Department made the following observation:

> "There is, of course, a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether or not the land contains valuable minerals. Where minerals are found it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals found are

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2/ The rule of discovery announced in Castle v. Womble, supra, reads as follows: "* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

> of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made."

Contrary to the claimant's assertion, the Department does not require a showing that a mining claimant has encountered a deposit which would be commercially profitable immediately. A valuable mine need not be a profitable one. Nevertheless, "the nucleus of value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result." United States v. Santium Copper Mines, Inc., supra.

Accordingly, the decision of the Hearing Examiner is affirmed.

Mr. Ford M. Converse is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. If an appeal is taken it must be filed with the Director, Bureau of Land Management, Washington 25, D.C. The amount of the filing fee will be $5 for each claim for which favorable action is sought; $10 if the appeal covers both of the claims involved in this decision. In taking an appeal there must be strict compliance with the regulations.

In the event an appeal is taken, the adverse party to be served by Mr. Converse will be:

Regional Attorney
Office of the General Counsel
U. S. Department of Agriculture
320 S. W. Stark Street
Portland 4, Oregon

S/ L. T. Hoffman
Assistant Director

APPENDIX E

DECISION BELOW

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of the Hearing Examiners
P. O. Box 21-4215
Sacramento 21, California

January 29, 1963

DECISION

United States of America	: Contest No. 011195-D
	: (P. L. 167)
v.	: Involving the Paymaster
	: and Edith Lode Claims,
Ford M. Converse	: embraced within Secs.
Mining Claimant	: 1 and 2, T. 12S., R.
	: 4 E., W.M., Oregon
In the Matter of Determina-	: (Willamette National
tion of Surface Rights on	: Forest), Recorded in
Certain Unpatented Lands of	: Book 8, pages 214 and
the United States	: 215, Official Records
	: of Linn County, Oregon

Surface Rights Restricted

The United States initiated this proceeding pursuant to the Act of July 23, 1955 (30 U.S.C., 1958 ed. sec. 611-615) to determine the rights of the claimant to the use of surface resources on two mining claims prior to the patenting of the claims. The claims were located prior to 1955 under the provisions of the general mining laws and were on national forest land under the jurisdiction of the Forest Service.

A hearing was held in Portland, Oregon on June 11, 1962, for the determination. At the hearing the Government was represented by E. Kendall Clarke and Elden Gish, Attorneys at Law, Office of the General Counsel, United States Department of Agriculture, Portland, Oregon. The mining claimant was represented by William B. Murray, Attorney at Law, Portland, Oregon.

The Issue

The general mining laws of 1872 reserve public lands "valuable for mineral" but authorize the acquisition of "valuable mineral deposits" through the location of mining claims. The validity and the effectiveness of a mining location is dependent upon the "discovery" of such a deposit. Also, these laws provide for the exclusive right of possession and enjoyment of the surface of mining claims by the locator. (30 U.S.C. 1958 ed. secs. 21, 22, 23, and 26).

The act of July 23, 1955 amended these laws by providing that mining claims shall not be used prior to the issuance of patent, for any purposes other than prospecting, mining, or processing operations and uses reasonably incident to mining.

Section 4 of the act provides that mining claims located after the date of the act "shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof."

Section 5 of the act requires the Secretary of the Interior, at the request of Federal agencies administering Federal lands, to publish notice to mining claimants that, if they wish to assert rights to surface resources in claims located before July 23, 1955, they must file verified statements indicating the date of location and identifying the claims or be deemed to have waived and relinquished such rights. If a verified statement is filed, the Secretary must fix a time and place for a hearing to determine the validity and effectiveness of any right asserted by a claimant that is contrary to or in conflict with the limitations of section 4.

Notice was published and the mining claimant filed a verified statement in which he claimed rights in the surface resources. Thereafter, the notice of hearing was served on the claimant in accordance with the applicable regulations (43 CFR 185.120 - 185.137). This notice stated that the Government would offer evidence at the hearing to establish that sufficient minerals had not been found within the claims to constitute a discovery of a valuable mineral deposit.

After the enactment of the act of July 23, 1955, the Departmental decisions have held that for claims located prior to the act, such as the claims in issue, the discovery of a valuable mineral deposit must have been perfected prior to July 23, 1955 in order for the claim to be free of the restrictive provisions and reservations in the act.

United States v. Kathryne Cragholm, United States v. Ralph Martin A-28690 (January 30, 1962); United States v. Elmer J. Gustafson, A-28665 (January 30, 1962).

Thus, the issue to be determined is whether a valuable mineral deposit had been discovered on either or both of the claims prior to July 23, 1955. Regardless of the outcome of the proceeding, the mining claimant has the right to use the claims for mining purposes and for any other purpose incidental to mining. The proceeding can effect only the surface resources, including the timber on the claims, which the parties stipulated is valued at $91,038.61.

Summary of Testimony

The two claims were located primarily for the base minerals copper, lead and zinc. They are within the Willamette National Forest and the Quartzville Mining District of Oregon. The recorded production in the district has been approximately $200,000 in gold and silver, most of which was produced before 1900. There is no recorded production of the base minerals in the district and there is no recorded production of any mineral since the second World War.

In 1910 the claims were owned by the claimant's father. At that time a tunnel 130 feet long was excavated along a vein and minerals removed from an extensive stope. A short time later the claims were abandoned and the claimant relocated them in 1951.

In 1959 and 1960 the Forest Service constructed an access road to the area across the Edith. In the process of constructing the road a number of cuts

exposing mineralization were made on the Edith. Prior to this road, access to the claims was by a mountain trail. In 1951 the closest road was 30 miles from the claims.

Most of the evidence regarding the minerals exposed in the road cuts on other workings and improvements constructed after 1955 was excluded from the hearing over the vigorous protest of the mining claimant. Many of the final opinions of the claimant's witnesses at the hearing were based in part on the exposures made after 1955. These opinions were not excluded but are considered material to the issue only to the extent that they relate to the facts known in 1955, or could have been known by investigating the improvements or outcrops available for examination at that time.

The Government's case in chief was presented through the testimony of Milvoy M. Suchy and Lloyd E. Holmgren. Both are mining engineers employed by the Forest Service. Mr. Suchy examined the Edith and Mr. Holmgren examined the Paymaster. They were accompanied by the mining claimant, his associates, or his employees during their examinations.

Mr. Suchy testified that the country rock of the area is composed of basalt, rhyolite, tuft and breccia, that this rock has been fractured in a northwesterly direction and contains minor parallel intersecting fractures, and that considerable pyritization was exposed in the fractures. The district has not been developed below the upper or oxidized zone but there are three properties, including the Converse claims, that do have sulphide zones exposed.

Mr. Suchy was first on the claims in 1958 and he examined the discovery cut and other improvements

or exposures which were available in 1955 on the Edith and took samples across the fractures and shear zones. The assay results of these samples disclosed little or no values. Another sample was a composite of several samples of the mineralization found in boulders along the creek on the claim. This mineralization contains visible shpalerite, galena and chalcopyrite and assayed gold - none, silver .3 ounces, lead .2%, copper .2%, and zinc 1.7% with a total indicated value of $5.90 per ton. He stated that there was no way of determining where the boulders came from. Also, he testified that there are fractures containing mineralization exposed in the road cuts at the southerly end of the Edith and that he had taken the strike of these fractures. From the strike he determinated that the fractures were parallel structures to the fractures exposed in the discovery cut at the north end of the claim. The road across the claim had not been constructed at the time of his first examination and at that time he saw no mineralization on the south end of the claim. He expressed the opinion that the structures on the north end of the claim, which were exposed in 1955, did not demonstrate any appreciable amount of hydrothermal circulation, that they were weak, and that they were not favorable for mineral deposition. He concluded that a prudent man would not be justified in expending further time or means on these structures.

On cross-examination he stated that the road cut on the Edith was 120 feet long, that there was a recent bulldozer cut near the road from 100 feet to 125 feet long, and that samples secured in these improvements were much more favorable than those taken at the north end of the claim. Of the three sulphide zones in the district, he has approved for patent one zone located northwest of the claims in issue and on approximately the strike of the veins

on the Edith. Mr. Suchy stated that there was sufficient mineralization exposed to justify additional exploration to determine whether there was continuity and persistency of values in the veins on the south end of the Edith. He advised the claimant to spend more money to make this determination.

Mr. Holmgren testified that on the west end of the Paymaster there is a tunnel 130 feet long which was caved 95 feet from the portal. At the point of the cave there was a fracture or stringer containing gouge and disseminated pyrite. In the tunnel there was an old stope and the remnant of an ore shoot was found which contained visible sulphides of chalcopyrite, galena, and sphalerite. An 18 inch sample of this material assayed $29.57 in gold, silver, lead, copper and zinc. He found nothing else in the tunnel which warranted sampling. He concluded that the little remnant of ore in the old stope did not justify the expenditure of money and effort.

On cross-examination Mr. Holmgren stated that the stope was the length of the ore shoot 20 feet to 25 feet long, that the stope goes up 30 feet in elevation and that he did not examine the top of the stope. He testified that at the time the tunnel was constructed there was no road into the area and because of the lack of access $29 ore would not be profitable.

The witnesses who testified on behalf of the mining claimant were Carl N. McInnis, Floyd Persons, Edward A. Leonard, Albert J. Walcott, Russell A. Paige, Richard A. Smith, Damon L. Leonard, and Ford M. Converse. Mr. McInnis described himself as a "rock hound" and stated that he has been reading books on mining for the past 10 to 12 years. Floyd Persons is a part time miner. Mr. Edward Leonard is

a civil engineer and has followed the mining business for a number of years. Dr. Walcott is a consulting engineer and a former professor of geology with a Ph.D. degree in geology. Mr. Paige is a geologist. Mr. Smith and Mr. Damon Leonard are miners. Mr. Converse has been a logger most of his life and recently has become interested in mining.

Mr. McInnis testified that he was in the tunnel on the Paymaster and found a vein on the roof of the tunnel 6 to 8 inches wide which was visible from the portal for a distance of 10 feet. He did not known how much further the vein extended in the tunnel. Two samples taken 3 feet apart of this vein by Mr. McInnis were assayed by the State Department of Geology of Oregon. The results were $112.64 and $122.68 a ton in gold, silver, copper, lead, and zinc. (Exh. 3). The material assayed was described by the State as "gouge and vein material, high percentage of galena and sphalerite with quartz." Written across the face of the certificate in ink are the words "these samples taken east of culvert in main vein of Edith." Although this language is inconsistent with the testimony, it was not questioned by the Government.

Another sample taken by Mr. McInnis was from an exposure near the creek on the Edith. This sample assayed $3.50 in gold (Exh. 2). Mr. McInnis concluded by stating that "it would be prudent to go ahead and invest a little more money in there" (Tr. 133) to develop a mine.

Mr. Persons testified that he has known Mr. Converse for the past 20 years and has been familiar with the two claims for 6 or 7 years. He has worked on the claims opening various areas by bulldozing, drilling and dynamiting. He secured a sample from the Paymaster tunnel across 12 inches

of vein material which assayed $71.51 mostly in lead and zinc (Exh. 4). Mr. Persons secured a number of additional samples from vein material which had been exposed either by the road cut or by improvements made after 1960.

Mr. Edward A. Leonard testified that he has been on both the claims, that the veins in the vicinity all have continuity, that there are a number of veins across the Edith, and the veins are all part of a general structure which traverses the area. Mr. Leonard secured a number of samples and the locations of his samples were plated on Exhibit 28 by exhibit number. His samples were Exhibit 5 across "a couple feet" (Tr. 166) near the road at the north end of the Edith; Exhibit 6, samples 10, 11 and 1 all across 2 to 3 feet from along the creek on the Edith near the discovery cut; Exhibit 8 from near the creek; and a rock sample (Exh. 32) containing visible sulphide minerals. The samples were assayed and showed very little value, but did establish that there was mineralization in the area. Mr. Leonard concluded that a prudent person would be justified in spending time and money on the claims to develop a paying mine. He stated that the record of the area in recent years has been poor, that it is very difficult to guess what your results would be, that the area has not been developed but that ores have been found on the surface, and "some little development work might turn up much better ore here than we locally presume" (Tr. 172).

Dr. Walcott testified that he had been on the Edith shortly before the hearing and had examined the mineralization exposed by the road cut. Since the mineralization was exposed in 1959 and 1960 the objection by the Government to his testimony regarding this mineralization was sustained. He then

stated that he had heard the previous testimony and had examined the assay certificates received in evidence. Based on this testimony he responded affirmatively to the question of whether a prudent man would be justified in spending time and money on the claims in an effort to develop a paying mine. He stated that the property looked reasonably promising. Later he stated that his opinion was based in part on what he had seen in driving along the road.

Mr. Paige was on the Edith the day before the hearing and was at the hearing and heard the previous testimony. He recommended a little more work on the Edith at the southern end to establish more continuity to the mineralization. He concluded that a prudent person would be justified in spending time and effort in the exploration of the Edith. Mr. Paige was shown rock Exhibits 31 and 32 and stated that they contained 98% and 40% galena, respectively.

Mr. Smith testified that he has worked on both the claims and has traced veins across both claims. He secured rock Exhibit 33 from a location above the road at a point in which the mineralization was 16 inches wide. This rock weighed about 15 pounds and the parties agreed that it contained 7 to 10% lead and 10 to 15% zinc. He expressed the opinion that the claims are worth developing and responded affirmatively to the question of whether a prudent man would expend further time and effort on the claims.

Mr. Damon L. Leonard corroborated some of the testimony given by the previous witnesses. In addition he stated that there were visible outcrops of mineralization above the road cuts before the road was constructed and that these outcrops were on the same vein exposed in the discovery cut.

Mr. Converse testified that Exhibit 34 was a rock sample which he had taken out of the Paymaster tunnel in 1910. The parties stipulated that this sample weighed 5 pounds and that it was 60% lead and 20% zinc. In 1951 at the time the claims were relocated he dug the discovery pit on the Edith. He stated that when the Forest Service constructed the road, this pit was filled with debris from the road and was still partially filled at the time it was examined by Mr. Suchy, the Government mineral examiner. His sample of minerals exposed in the pit assayed from $7 to $20 a ton. During 1910 he worked for the Government surveying land in the area and at that time the section on which the claims were located was determined to be mineral in character. In the last 5 years he has spent $10,000 on the development of the claims.

Mr. Converse has traced ore from the discovery pit on the Edith along the creek and up the hill toward the southern end of the claim. The ore found along the creek was in boulders but he could not tell where the boulders came from. He stated that there are two parallel veins on the Edith, one of which was exposed in the discovery cut. He has not determined whether the two veins are in the same zone. Recently Mr. Converse employed W. G. Johnston to examine the claims and prepare a report. (Counsel for the mining claimant stated that W. G. Johnston received a Ph.D. degree in geology from the Massachusetts Institute of Technology and that he is a registered engineer in the Province of Ontario and the State of Oregon.)

Dr. Johnson's report dated February 12, 1962 was received in evidence as Exhibit 25. This report is based on recorded information, the historical background of the district, information supplied by Mr. Converse, and on a personal examination of

the Edith claim made on the afternoon of July 31, 1961. Although the conclusions reached by Dr. Johnson were in part based on the minerals exposed in recent years, it did relate back to the time the claims were located in 1951. Dr. Johnson concluded as follows:

> "The veins carry heavy almost massive sulphides which to casual and megascopic examination should be easy to concentrate as the sulphides are coarse and not intergrown. In order to realize highest smelter returns it will be necessary to make three concentrates: copper, lead and zinc, and the most satisfactory method of making these is by floatation. As a floatation plant is costly, before any plans for actual milling are made it will be necessary to have sufficient tonnage proven to justify installation of a plant.
>
> "The veins appear to be fissure veins apparently in very continuous structures hence the problem is to locate mineralized sections of these structures which are of sufficient grade and width to make ore."

Findings of Fact

From the evidence adduced at the hearing several findings appear evident. Minerals have been known to be in the area of the claims for half a century but there is no recorded production of sulphide minerals. In 1910 a tunnel 130 feet long was excavated as a drift along a sulphide vein. The extensive stope in the tunnel suggests that a quantity of these minerals were removed and one 5 pound specimen sample containing 80% lead and zinc has been in the possession of the mining claimant since that time.

Regardless of the quality of the minerals the quantity was insufficient to support a mining operation and the claims were abandoned. One cause of the abandonment referred to by the mining claimant was the lack of access to the claims. At the time of the relocation in 1951 little or no additional evidence of mineralization on the Paymaster was known. On the Edith minerals were found on a cliff, in the discovery cut, and in boulders along the creek. But these minerals were not comparable in value to the minerals previously abandoned on the Paymaster nor were they found in veins as favorable as the vein on the Paymaster. The distance between the claims and a usable road in 1910 was not given. This distance in 1951 and until after 1955 was 30 miles. Access to the claims during the period was by way of a mountain trail.

Dr. Johnson stated in his report of 1962 that the problem was to determine whether there was a sufficient concentration of minerals to justify the cost of development. This was also the problem prior to 1956. At the earlier date the cost would have included an access road as well as a processing plant. There was no evidence at the hearing that this determination had been made. I am not convinced that a prudent man would initiate a program of developing minerals on the claims until his exploration was sufficiently complete for him to determine whether there was a reasonable chance of making a profit. Consequently, the most favorable finding which I can make for the mining claimant is that in 1955 there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed. I do not find in the record sufficient evidence of mineralization as of July 23, 1955, to induce a prudent man to expend labor and means on

either claim with a reasonable expectation of developing a valuable mine.

Conclusion of Law

In the determination of what constituted the discovery of a valuable mineral deposit within the purview of the mining laws, the Department and the courts have held that a discovery of a valuable mineral deposit sufficient to validate a mining location, under the mining laws, must be such as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1895); Cameron v. United States, 252 U.S. 450 (1920). And, the ultimate burden of proving discovery by a preponderance of evidence is on the mining claimant. Foster v. Seaton, 271 F.2d 836 (1950.

In a brief submitted after the hearing, the mining claimant argued at length that the willingness of a mining claimant to explore a claim was sufficient to satisfy the discovery requirements of the mining laws. This contention has been fully considered and rejected by the Department in United States v. Santiam Copper Mines, Inc., A-28272 (June 27, 1960); United States v. Amcol Mining and Milling Company, A-28405 (June 27, 1960); United States v. Clyde Raymond Altman and Charles M. Russel, A-28478 (July 17, 1961).

Final Conclusion

Since the mining claimant failed to establish that there was sufficient evidence of mineralization as of July 23, 1955 to induce a prudent person to expend time and means with a reasonable expectation of

developing a valuable mine, I conclude that there was not a discovery of a valuable mineral deposit within the purview of the mining laws on either claim. Accordingly, the Edith and Paymaster claims are subject to the limitations and restrictions specified in Section 4 of the act of July 23, 1955.

Right of Appeal

This decision becomes final 30 days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. There must be strict compliance with the regulations in 43 CFR, Part 221, as amended (see enclosed Form 4-1364). If an appeal is taken, it must be filed in the Office of the Hearing Examiners, P. O. Box 21-4215, Sacramento 21, California. The adverse party to be served with a copy of the appeal is: Office of the General Counsel, U. S. Department of Agriculture, 320 S. W. Stark Street, Portland 4, Oregon. The amount of the filing fee will be $5 for each claim involved in the appeal.

Rulings on Proposed Findings of Fact Submitted by the Mining Claimant are as follows:

Finding No. 1. The first two sentences are adopted. The third sentence is amended to read: "Access roads were built into the area in 1959 and 1960."

Finding No. 2. Is amended to read: The land on which the claims are located is mineral in character.

Finding No. 3. The first sentence except for the last clause "which are on the same major structure" is adopted. There was no evidence to support this claim. The second and third sentences are adopted.

Finding No. 4. The first sentence is denied. The great weight of the evidence was that the veins on the Edith had a strike of approximately N.45°W and could not be along the load line. The second sentence is adopted.

Finding No. 5. The first sentence is adopted. The second sentence is denied. It is not supported by consistent testimony. The Third sentence is inaccurately stated. There are two samples shown on the assay certificate (Exh. 1) dated September 10, 1950. The first had 61.2% lead and .35% copper. The per ton value of this sample at the prices of lead and copper given at the hearing is in excess of $150. The second sample contains .12 oz. gold, .96 oz. silver, .43% lead and 4.15% copper. The value shown on the certificate for the second sample is $31.86. Whether these samples came from boulders, the face of a cliff or the discovery pit is not clear from the testimony.

Finding No. 6. Is adopted. Many of the assay certificates contain more than one sample and the exhibit number on the plat does not distinguish between samples.

Finding No. 7. Is adopted with the following exception: The samples were both chip and grab samples and the 4th sample labeled 6 was from a site west of the road not near the discovery cut. A computation of value for the 2nd sample with lead at 12.36 cents a pound will result in a value of over $150 per ton.

Finding No. 8. Is adopted.

Finding No. 9. Is denied. This finding is not supported by the evidence.

Finding No. 10. Is denied. This finding is not material to the issue.

Finding No. 11. Is denied. This finding is not material to the issue.

Finding No. 12. Is adopted.

Finding No. 13. Is denied for the reasons set forth in the decision.

Finding No. 14. Is adopted subject to correction of sample No. 4. In this sample the percentages of copper and lead have been inverted.

Finding No. 15. Is adopted.

Finding No. 16. Is denied for the reasons set forth in the decision.

Finding No. 17. Is denied for the reasons set forth in the decision.

S/ Graydon E. Holt

Graydon E. Holt
Hearing Examiner

APPENDIX F

STATUTE BELOW

Title 30 U.S.C.--Mineral Lands and Mining
Chapter 15.--SURFACE RESOURCES
Subchapter II. MINING LOCATIONS

Section 613. Procedure for determining title uncertainties.

(a) Notice to mining claimants; request; publication; service.

The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

. . . .

Title 30 U.S.C. Section 613(a) continued:

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

. . . .

(c) Hearings.

(c). . . .The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States.

. . . .

Title 30 U.S.C. Section 613(e)--Failure to deliver or mail copy of notice.

If any department or agency requesting publicaction shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person. (July 23, 1955, ch. 375, sec. 5, 69 Stat. 369.)

APPENDIX G

STATUTE BELOW

Title 5 U.S.C. Section 1004(c)--Authortiy and functions of officers and employees

No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, ...(60 Stat. 239)

Title 5 U.S.C. Section 1005(b) Issuance of process; investigations; transcript of evidence

No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. . . . . (60 Stat. 240)

Title U.S.C. Section 1008(a)--Imposition of Sanctions

In the exercise of any power or authority--
(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

APPENDIX H

STATUTE BELOW

Chapter 1.--CODE OF FEDERAL REGULATIONS
TITLE 43, January 1, 1962
Subpart C. CONTESTS AND PROTESTS

Section 221.53 Initiation of contest.

Any person desiring to initiate a private contest must file a complaint in the land office which has jurisdiction over the land involved, or, if there is no such land office, in the Office of the Director, Bureau of Land Management, Washington 25, D.C. The contestant must serve a copy of the compliant on the contestee not later than 30 days after filing the complaint and must file proof of such service, as required by section 221.95, in the office where the complaint was filed within 30 days after service. (Circ. 2068, 26 F.R. 10479, Nov. 7, 1961)

Section 221.54 Contents of Complaint. The complaint shall contain the following information: under oath:
(a) The name and address of each party interested, including the age of each heir of any deceased entryman.

(b) A legal description of the land involved.

(c) A reference, so far as known to the contestant, to any proceedings pending for the acquisition of title to, or an interest in, such land.

(d) A statement in clear and concise language of the facts constituting the grounds of contest.

(e) A statement of the law under which contestant claims or intends to acquire title to, or an interest in, the land nd of the facts showing that he is qualified to do so.

(f) A statement that the proceeding is not collusive or speculative but is instituted and will be diligently pursued in good faith.

(g) A request that the contestant be allowed to prove his allegations and thatthe adverse interest be invalidated.

(h) The office in which the complaint is filed and the address to which papers shall be sent for service on the contestant.

(i) A notice that unless the contestee files an answer to the complaint in such office within 30 days after service of the notice, the allegations of the complaint will be taken as confessed.

Section 221.58 Service (a) The complaint must be served upon every contestee. If the contestee is of record in the land office, service may be made and proved as provided in section 221.95. If the person to be served is not of record in the land office, proof of service may be shown by a written statement of the person who made personal service, by post-office return receipt showing personal delivery, or by an acknowledgment of service. In certain circumstances, service may be made by publication as provided in section 221.60.

Section 221.68 Proceedings in Government contests. The proceedings in Government contests shall be governed by the rules relating to proceedings in private contests.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 746

FORD M. CONVERSE, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A15) is reported at 399 F. 2d 616. The opinion of the district court (Pet. App. A17–A42) is reported at 262 F. Supp. 583. The decision of the Secretary of the Interior (Pet. App. A42–A62) is reported at 72 I.D. 141.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1968. A petition for rehearing was denied on October 7, 1968. The petition for a writ of certiorari was filed on November 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent portions of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 368–371, 30 U.S.C. 612(a), 612(b), 613(a), 613(c), 613(e), are set forth in the Appendix to this brief, *infra*, pp. 6–12.

QUESTIONS PRESENTED

1. Whether the proper statutory procedures were followed within the Department of the Interior in determining that the United States is to manage the surface resources of petitioner's unpatented mining claims.

2. Whether the courts below properly found that the factual determination by the Secretary of the Interior that there had been no valid discovery of minerals as of the requisite date was supported by substantial evidence.

STATEMENT

1. Section 4 of the Surface Resources Act of 1955 generally reserved to the United States the right to manage and dispose of the surface resources of mining claims which are located after the passage of the Act.[1] The Act does not interfere with a prospector's right to continue to seek minerals on the public domain and to apply for and obtain a fee patent if he complies with the mining laws in all respects. Section 5 of the Act, involved here, provides the procedure for establishing who is to manage the surface resources of unpatented mining claims which had been located prior to the passage of the Act. That determination hinges on

[1] The Act became effective on July 23, 1955.

whether a valid discovery of a mineral in paying quantities has been made.

2. In accordance with the provisions of Section 5, a request was made by the Chief of the Forest Service, acting on behalf of the Secretary of Agriculture, for a determination as to whether the United States had the right to manage the surface resources of petitioner's two mining claims[2] (R. 233). Pursuant to the statutory procedures, a notice was published (R. 241–242) and mailed to mining claimants (R. 240), the required certificate of examination was filed (R. 235), as was a certificate of the nonexistence of tract indexes (R. 238). Following departmental regulation, 43 C.F.R. 1852.3-2, notice was given to petitioner by the hearing examiner of the time, place, and nature of the hearing, the legal authority and jurisdiction under which the hearing was to be held, and the matters of fact and law involved (Pet. App. A73). In response to these notices, petitioner filed a verified statement, showing actual notice (R. 265; Pet. App. A33).

The sole issue at the hearing before the examiner was whether a valuable deposit of minerals had been discovered on either of the two claims prior to July 23, 1955.[3] Most of petitioner's evidence pertained to matters after that date (Pet. App. A52; R. 17), and the hearing examiner ruled that petitioner had not

[2] Timber valued at more than $90,000 is situated on the land involved (Pet. App. A8; Pet App. A19).

[3] The hearing examiner rejected a motion of bias and prejudice as not having been timely filed under 5 U.S.C. 1006(a) (now U.S.C. 556(b) (Supp. III)) (Pet. App. A24–A25).

established a valid discovery prior to that date. The Director of the Bureau of Land Management and the Secretary of the Interior, in turn, affirmed that determination.

In the courts below, petitioner asserted alleged procedural errors and error in the Secretary of the Interior's finding of a lack of "discovery." Both courts, in detailed opinions, affirmed the Secretary's decision.

ARGUMENT

1. As shown by the opinion of the district court, adopted on these points by the court of appeals, the procedure followed by the Department of the Interior complied with all statutory and constitutional requirements. Petitioner emphasizes (Pet. 5, 12) that the district court remarked that he was "technically correct" that no certificate of title or abstract of title had been submitted along with the Agriculture Department's request for publication, as called for by the statute (30 U.S.C. 613(a), *infra,* p. 8). But such certificates or abstracts are, under the Act, to be "based upon * * * tract indexes in the county office of record * * * *if any* * * *" (*infra,* pp. 8–9) (emphasis added). Thus, the district court was on firm ground in holding (Pet. App. A33) that, since there were *no* tract indexes of the lands in question, the submission of certificates of non-existence of tract indexes was sufficient compliance with the Act. Moreover, it is readily apparent that petitioner received notice, was aware of the issue, was heard, and lost his case on the facts. There is nothing presented to warrant review by this Court.

2. The proceedings below applied the principles recently approved by this Court in *United States* v. *Coleman,* 390 U.S. 599. The record supports the factual determination that no valid discovery had been made on these two claims as of July 23, 1955. This was the unanimous conclusion at three levels within the Interior Department and in the two courts below. We rely on the careful analysis by the court of appeals (Pet. App. A4–A15) as demonstrating that, applying the proper legal standards as the Secretary did, the administrative decision is warranted by the record. Re-examination of this question (see Pet. 4, q. 3), is not an appropriate function for this Court.

3. If petitioner believes that he presently has a valid mineral discovery, he may, if he wishes, apply for a patent and have an administrative determination made as to that claim. If successful, he would be entitled to the patent unencumbered by any restrictions of the Surface Resources Act, which applies only to unpatented lands.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
CLYDE O. MARTZ,
Assistant Attorney General.
S. BILLINGSLEY HILL,
GEORGE R. HYDE,
Attorneys.

DECEMBER 1968.

APPENDIX

Statute Involved

The Surface Resources Act of July 23, 1955, 69 Stat. 367, provides in pertinent part:

Section 4 of the Act, 69 Stat. 368–369, 30 U.S.C. 612—

(a) Prospecting, mining or processing operations.

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

(b) Reservations of the United States to use of the surface and surface resources.

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however,* That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with pros-

pecting, mining or processing operations or uses reasonably incident thereto: *Provided further,* That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: *Provided further,* That nothing in sections 601, 603, and 611–615 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

* * * * *

Section 5 of the Act, 69 Stat. 369–371, 30 U.S.C. 613—

(a) Notice to mining claimants; request; publication; service.

The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land sur-

veys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the

address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim—

(1) the date of location;

(2) the book and page of recordation of the notice or certificate of location;

(3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;

(4) whether such claimant is a locator or purchaser under such location; and

(5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim;

such failure shall be conclusively deemed (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims.

If such notice is published in a daily paper, it shall be published in the Wednesday issue for nine consecutive weeks, or, if in a weekly paper, in nine consecutive issues, or if in a semiweekly or triweekly paper, in the issue of the same day of each week for nine consecutive weeks.

Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail or by certified mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an

affidavit filed as aforesaid, and to each person who may have filed, as to any lands described in said notice, a request for notices, as provided in subsection (d) of this section, and shall cause a copy of such notice to be mailed by registered mail or by certified mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed.

* * * * *

(c) Hearings.

If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearing* shall be set as shall be necessary to

* So in original. Probably should be "hearings".

comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecing public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim, then no subsequent proceedings under this section shall have any force or effect upon the so-affirmed right or interest of such mining claimant under such mining claim. If at any time prior to a hearing the department or agency requesting publication of notice and any person filing a verified statement pursuant to such notice shall so stipulate, then to the extent so stipulated, but only to such extent, no hearing shall be held with respect to rights asserted under that verified statement, and to the extent defined by the stipulation the rights asserted under that verified statement shall be deemed to be unaffected by that particular published notice.

* * * * *

(e) Failure to deliver or mail copy of notice.

If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person.

U.S. GOVERNMENT PRINTING OFFICE: 1968